Office - Supreme Court, U.S.
FILED
JUN 4 1982
ALEXANDER L. STEVAS,
CLERK

81-2236

No. ——

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID LOCKWOOD, *Appellant,*

v.

JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

DAVID T. BRYANT
National Right To Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel For The Appellant

Of Counsel:

REX H. REED
National Right To Work Legal Defense Foundation, Inc.

JAY TIMS
Harrington, Huxley & Smith
1200 Mahoning Bank Building
Youngstown, Ohio 44503

FANNON PRINTING CENTER, ALEXANDRIA, VIRGINIA 22302 (703) 998-6011

QUESTIONS PRESENTED BY THE APPEAL

I. IN THE ABSENCE OF A STATUTORY DETERMINATION THAT LABOR PEACE REQUIRES COMPULSORY COLLECTIVE BARGAINING BETWEEN PUBLIC EMPLOYERS AND THEIR EMPLOYEES AND FORCED PAYMENT OF DUES OR FEES BY THE EMPLOYEES TO A LABOR ORGANIZATION (BILLS AUTHORIZING SUCH PROVISIONS HAVING BEEN TWICE VETOED BY THE GOVERNOR), DO PUBLIC EMPLOYEES HAVE A FEDERAL CONSTITUTIONAL RIGHT TO REFRAIN FROM FINANCIAL SUPPORT OF A LABOR ORGANIZATION?

II. WHEN EXERCISING A DISCRETIONARY POWER TO BARGAIN COLLECTIVELY WITH A REPRESENTATIVE OF ITS EMPLOYEES, MAY A PUBLIC EMPLOYER ENTER INTO AN AGENCY SHOP PROVISION WHICH ADVERSELY AFFECTS THE TERMS OF PREEXISTING CONTRACTS WITH INDIVIDUAL EMPLOYEES?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED BY THE APPEAL i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPORTS OF OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED .. 2

STATEMENT OF THE CASE 6

REASONS FOR PLENARY CONSIDERATION 11

I. This Court's Decision In *Abood* v. *Detroit Board Of Education* Did Not Settle All Constitutional Questions Concerning Compulsory Unionism In The Public Sector 11

1. In The Absence Of A Statute Authorizing Compulsory Unionism Public Employees Have A Constitutional Right To Refrain From Providing Financial Support To A Union 11

2. The State Of Ohio Has Not Enacted Legislation Authorizing Agency Shop Agreements .. 15

3. The Action Of The Supreme Court Of Ohio Is Legislative In Nature And Deprives Mr. Lockwood Of Rights Guaranteed By The First And Fourteenth Amendments To The Constitution 18

II. The Result Below Violates Article I, Section 10, Of The Constitution 21

CONCLUSION 23

Table of Contents Continued

Page

APPENDIX

Opinion Of The Supreme Court Of Ohio 1a

Opinion Of The Court Of Appeals Of Ohio 8a

Supplement (*sic*) Opinion Of The Ashtabula County Court 17a

Opinion Of The Ashtabula County Court 20a

Judgment Of The Supreme Court Of Ohio 24a

Mandate Of The Supreme Court of Ohio 25a

Notice Of Appeal To The Supreme Court Of The United States 26a

Notice Of Appeal To The Supreme Court Of Ohio.. 28a

Order Granting Motion To Certify The Record ... 29a

Governor Rhodes' Veto Message Amended Substitute Senate Bill No. 70 ..... 30a

Governor Rhodes' Veto Message Amended Substitute Senate Bill No. 222 ..... 36a

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 7, 11, 13, 14, 15, 18, 19, 20, 21

American Federation of State, County, and Municipal Employees v. Woodward, 406 F.2d 137 (8th Cir. 1969) 11

Atkins v. City of Charlotte, 296 F.Supp. 1068 (W.D. N.C. 1969) 11

Table of Authorities Continued

Page

Branti v. Finkel, 445 U.S. 507 (1980) 12

Breard v. City of Alexandria, 341 U.S. 622 (1951) 14

City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 21

Dayton Teachers Association v. Dayton Board of Education, 41 Ohio St.2d 127, 323 N.E.2d 714 (1975).. 18, 19

Elrod v. Burns, 427 U.S. 347 (1976) 12, 15, 19

Eubank v. Richmond, 226 U.S. 137 (1912) 15

Euclid v. Ambler Realty Company, 272 U.S. 365 (1926) 15

Gavett v. Alexander, 477 F.Supp. 1035 (D.D.C. 1979).. 12

Gerrin v. Hickey, 464 F.Supp. 276 (E.D. Ark. 1979)... 12

Greminger v. Seaborne, 584 F.2d 275 (8th Cir. 1978).. 12

Jefferson Area Teachers Association v. Lockwood, 69 Ohio St.2d 671, 433 N.E.2d 604 (1982) 1

Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981) 12

Kolinske v. International Union, UAW, 530 F.Supp. 728 (D.D.C. 1982) 12

Lathrop v. Donohue, 367 U.S. 820 (1961) 2, 18

Lontine v. VanCleave, 483 F.2d 966 (10th Cir. 1973).. 12

Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928) 20

McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).. 12

Mescall v. Rockford, 655 F.2d 111 (7th Cir. 1981) 12

Murray v. Charleston, 96 U.S. 432 (1877)..... 21

Nebbia v. People of State of New York, 291 U.S. 502 (1934) 14

Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970) 12

Table of Authorities Continued

Page

Perry Local Educators' Association v. Hohlt, 652 F.2d 1286 (7th Cir. 1981) 12

Petrucci v. Hogan, 5 Misc.2d 480 (N.Y. Sup. Ct. 1941). 12

Rehor v. Case Western Reserve University, 43 Ohio St.2d 224, 331 N.E.2d 416 (1975) 9

Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463 (1979) 12, 19

U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) 21, 22

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) ... 15

Walsh v. School Dist. of Philadelphia, 343 Pa. 178, 22 A.2d 909, *cert. denied*, 315 U.S. 823 (1941) 21

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 12

Wooley v. Maynard, 430 U.S. 705 (1977) 12

Youngstown State University v. Robert H. Secrest, Unreported Seventh District Court of Appeals Case No. 77 CA 163, November 8, 1978 9

Statutes and Court Rules

United States Code

5 U.S.C. § 7102 20

28 U.S.C. § 1257(2) 2, 19

39 U.S.C. § 1209(c) 20

Ohio Revised Code

§ 9.41 3-4

§ 1321.32 3

§ 3313.17 ..... 4, 17

Table of Authorities Continued

Page

§ 3313.20 ..... 4-5, 17

§ 3313.47 ..... 5, 17, 18

§ 3319.08 21

Ohio Supreme Court Rule 2 10

Constitutional Provisions

Constitution of the United States

Article I, Section 10 ..... 2, 21

First Amendment 2, 11, 13, 14, 15, 18, 19, 20

Fourteenth Amendment 2, 11, 13, 15, 18, 19, 20

Constitution of Ohio

Article I, Section 3 2

Article I, Section 11 2-3

Article I, Section 19 3

Article II, Section 1 ..... 3, 20

Article II, Section 28 3

Article IV, Section 2 10

Other Authorities

L. Tribe, *American Constitutional Law* §§ 15-18 (1978) 12

No. ——

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID LOCKWOOD, *Appellant*,

v.

JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

REPORTS OF OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 69 Ohio St.2d 671, 433 N.E.2d 604 (1982). The opinions of the Court of Appeals and the Ashtabula County Court are not reported.

GROUNDS FOR JURISDICTION

This action started as a civil action for money damages equal to a "representation fee" purportedly authorized by a collective bargaining agreement between Mr. Lockwood's employer, the Jefferson Area School District, and the Jefferson Area Teachers Association. Judgment affirming the award of damages was entered

on March 9, 1982. Notice of appeal was filed on May 10, 1982, in the Supreme Court of Ohio. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1257(2) and *Lathrop* v. *Donohue*, 367 U.S. 820 (1961).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Constitution Of The United States

Article I, Section 10. No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Constitution Of Ohio

Article I, Section 3. The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances.

Article I, Section 11. Every citizen may freely speak, write, and publish his sentiments on all sub-

jects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

Article I, Section 19. Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Article II, Section 1. The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. . . .

Article II, Section 28. The General Assembly shall have no power to pass . . . laws impairing the obligation of contracts . . . .

C. Ohio Revised Code

§ 9.41. Notwithstanding section 1321.32 of the Revised Code, the state of Ohio and any of its political subdivisions or instrumentalities may checkoff on the wages of public employees for the payment

of dues to a labor organization or other organization of public employees under written authorization by the public employee. Such authorization may be revocable by written notice upon the will of the employee.

A labor organization or other organization of public employees receiving such checkoff of dues may be required by the state of Ohio and any of its political subdivisions or instrumentalities to defray the actual cost of making such deductions.

§ 3313.17. The board of education of each school district shall be a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property.

§ 3313.20. The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. Rules and regulations regarding entry of persons other than students, staff, and faculty upon school grounds or premises shall be posted conspicuously at or near the entrance to such grounds or premises, or near the perimeter of such grounds or premises if there are no formal entrances, and at the main entrance to each school building. Any employee may receive compensation and expenses for days on which he is excused, in accordance with the policy statement of the board by the superintendent of such board or by a responsible administrative official designated by the superintendent for the purpose of attending professional meetings as defined by the board policy, and the board may provide and pay the salary of a substitute for such days. The expenses thus incurred

by an employee shall be paid by the board from the appropriate fund of the school district or the county board fund provided that statements of expenses are furnished in accordance with the policy statement of the board.

Each city, local, and exempted village school district shall adopt a written policy governing the attendance of employees at professional meetings.

§ 3313.47. Each city, exempted village, or local board of education shall have the management and control of all of the public schools of whatever name or character in its respective district. If the board has adopted an annual appropriation resolution, it may, by general resolution, authorize the superintendent or other officer to appoint janitors, superintendents of buildings, and such other employees as are provided for in such annual appropriation resolution.

D. Collective Bargaining Agreement

I. Recognition

A. Recognition

The Jefferson Area Local Board of Education, hereinafter called the "Board", recognizes the Jefferson Area Teache[illegible] Association, hereinafter called "JATA" or the "Association", as the sole and exclusive bargaining agent for all teachers within the bargaining unit; including all classroom teachers, district librarians, special education teachers, and guidance counselors, until such time as it is defeated in a representative election used to determine representation for the teachers.

III. Rights of the Association

M. Service Fee for Representation

In recognition of the Association's services to the bargaining unit, all members of the bargaining unit shall either be members of the Association or share

in the financial support of the Association by paying to the Association a service fee equivalent to the amount of dues uniformly required of members of the United Teaching Profession.* Bargaining unit members may either pay directly to the Association or by dues deduction made pursuant to a properly executed Payroll Deduction Authorization form delivered to the School Board. The payment of dues or a service fee shall be a condition of employment.

---

* Members of the bargaining unit under contract during the 1977-78 school year but not members of JATA, excluding those on leaves of absence, shall contribute 50% of the United Teaching Profession dues to JATA as a service fee.

XV. General Provisions of the Master Agreement

B. Severability

If any provision of this Agreement or any application thereof to any teacher or group of teachers is held to be contrary to law, then such provision or application will not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications will continue in full force and effect. The parties will meet not later than ten (10) days after any such holding for the purpose of renegotiating the provision or provisions affected.

STATEMENT OF THE CASE

Mr. Lockwood is a teacher employed by the Jefferson Area Local Board of Education (Board). On April 25, 1978 he entered into a two-year contract with the Board. The contract provides that he agrees: "To abide by and maintain the rules and regulations adopted by Jefferson Area Local Board of Education for the government of said schools of said district."

Subsequently, on May 16, 1978, the Board ratified a collective bargaining agreement with the Jefferson Area Teachers Association (Association) for a unit of employees which includes Mr. Lockwood. Notwithstanding that no Ohio statute requires public employers to bargain with representatives of their employees or authorizes them to enter into union security agreements, the agreement included the agency shop and the other provisions set out above. Prior agreements between the Board and the Association did not contain an agency shop provision.

The Association demanded payment and Mr. Lockwood refused to pay the fee. Rather than following the remedy in the collective bargaining agreement (discharge), the Association brought suit against Mr. Lockwood in the Small Claims Division of the Ashtabula County Court. Mr. Lockwood defended himself at the trial. In its initial decision [Appendix (hereinafter —a) 20a] the trial court held that *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977) was not controlling because Ohio had no statute similar to the Michigan statute involved in that case and rendered judgment for Mr. Lockwood. The Association filed a motion for reconsideration and new trial. In its Supplement (*sic*) Decision denying the motion (17a) the trial court stated:

> Let us keep intact (*sic*) that an individual as a person and because he is an American has certain fundamental constitutional rights—one of them being the right to refuse to pay agency shop service fees in lieu of union dues when he is not a member of and does not belong to the Union. (18a)
>
> It is the opinion of this Court that the aforesaid [agency shop] provision exceeds the authority of

> Jefferson Area Local Board of Education; it is arbitrary and unreasonable; it is contrary to public policy and therefore is illegal and unconstitutional. (18a)
>
> This Court refuses to apply the Terms of the Master Agreement retroactively. The fact that Defendant-Teacher's individual agreement entered into by him with Jefferson Area Local Board of Education on April 25, 1978, requires him "to abide by and maintain the rules and regulations adopted by Jefferson Area Local Board of Education for the government of said schools of said district" does not require conformity with contractural (*sic*) obligations entered into by Jefferson Area Local Board of Education with Plaintiff-JATA on May 16, 1978. (19a)

The Association appealed. In the Court of Appeals the Association's first Assignment of Error was:

> The Trial Court Erred To The Prejudice Of Appellants In Ruling Appellee May Avoid The Obligation To Pay A Service Fee On Constitutional Grounds.

Mr. Lockwood's brief in the Court of Appeals contained the following arguments:

> A PUBLIC EMPLOYER IN OHIO, WITHOUT THE CONSENT OF THE EMPLOYEE, DOES NOT HAVE THE AUTHORITY TO OBLIGATE AN EMPLOYEE TO PAY DUES OR FEES TO A LABOR ORGANIZATION.
>
> A. An Individual Public Employee Has A Constitutional Right to Refuse To Pay Service Fees To A Labor Organization.
>
> 1. Exclusive representation and agency shops, in the absence of an authorizing statute, are unconstitutional.

2. Forcing a non-member public employee, without his/her consent, to pay service fees to a union is unconstitutional.

* * * *

C. Pre-Existing Employment Contracts Of Ohio Public Employees Are Not Superseded By A Collective Bargaining Agreement Between Their Employer And A Union Subsequent To The Execution Of The Individual Agreement.

The Court of Appeals reversed the trial court and rendered judgment for the Association. In doing so the court quoted with approval from its opinion in *Youngstown State University* v. *Robert H. Secrest*, Unreported Seventh District Court of Appeals Case No. 77 CA 163, November 8, 1978 as follows:

> In the recent decision of *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 26, 45 L.W. 4475 (1977), the U.S. Supreme Court disposed of appellant's constitutional claims. The high Court found constitutionally sound an "agency shop" agreement, authorized by Michigan law between local government employees and its selected union, whereby teachers who were not members of a union selected as the exclusive bargaining representative were required to pay the union a service fee equivalent to union dues. Although Ohio has no collective bargaining statute in the public sector, a contract in the absence of such statute is not an infringement of an employee's first and fourteenth Amendment rights. Thus, *Abood* is dispositive of the alleged constitutional infirmities at bar. (10a)

Also, citing *Rehor* v. *Case Western Reserve University*, 43 Ohio St.2d 224, 331 N.E.2d 416 (1975), the court allowed the collective bargaining agreement to be applied retroactively to Mr. Lockwood's individual employment contract. (14a)

Mr. Lockwood appealed to the Supreme Court of Ohio stating in the Notice of Appeal that "This case involves a substantial constitutional question". (28a) In Ohio, appeal to the Supreme Court is a matter of right in cases involving substantial constitutional questions. Constitution of Ohio, Article IV, Section 2(B)(2)(a)(iii). The Ohio Supreme Court granted review but did so by treating the appeal as a motion to certify the record and granted the motion. (29a) This means that the Supreme Court of Ohio felt that no constitutional questions were involved. *See,* Ohio Supreme Court Rule 2, Sections 2 and 3. Nevertheless, Mr. Lockwood argued in his brief to the Ohio Supreme Court as follows:

III. IN EXERCISING THEIR DISCRETIONARY POWER TO BARGAIN COLLECTIVELY WITH REPRESENTATIVES OF THEIR EMPLOYEES PUBLIC EMPLOYERS MAY NOT ENTER INTO COLLECTIVE BARGAINING AGREEMENTS WHICH ADVERSELY AFFECT THE TERMS OF PREEXISTING INDIVIDUAL EMPLOYMENT CONTRACTS WITH THEIR EMPLOYEES

IV. IN THE ABSENCE OF SPECIFIC STATUTORY AUTHORITY AUTHORIZING PUBLIC EMPLOYERS TO ENTER INTO UNION SECURITY AGREEMENTS, PUBLIC EMPLOYEES HAVE A CONSTITUTIONAL RIGHT TO REFRAIN FROM FINANCIAL SUPPORT OF A UNION REPRESENTATIVE

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals stating in the footnote to its Opinion as follows:

> *Abood* v. *Detroit Bd. of Edn.* (1977), 431 U.S. 209, settles all relevant constitutional questions. In *Abood,* the United States Supreme Court upheld the constitutionality of a Michigan statute which permitted a local government employer and a union to enter into an "agency shop" arrangement under which "every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues." *Id.,* at 211. The court approved the statutory scheme at least to the extent that non-member contributions supported the union as an exclusive collective-bargaining representative. *Id.,* at 222-224. Therefore, we need not comment further on the constitutional issue which appellant raises. (2a)

The decision of the Ohio Supreme Court was rendered on March 9, 1982. Notice of Appeal to this Court was filed in the Supreme Court of Ohio on May 10, 1982. This Jurisdictional Statement was filed with the Court within ninety days of March 9.

REASONS FOR PLENARY CONSIDERATION

I. This Court's Decision in *Abood* v. *Detroit Board of Education* Did Not Settle All Constitutional Questions Concerning Compulsory Unionism In The Public Sector.

1. In The Absence Of A Statute Authorizing Compulsory Unionism Public Employees Have A Constitutional Right To Refrain From Providing Financial Support To A Union.

Today, it is quite clear that public employees have a Constitutional right to form, join, and assist labor organizations. This right is granted by the First and Fourteenth Amendments to the U.S. Constitution.

Smith v. *Arkansas State Highway Emp. Local 1315*, 441 U.S. 463 (1979) (by implication); *Mescall* v. *Rockford*, 655 F.2d 111 (7th Cir. 1981); *Perry Local Educators' Ass'n* v. *Hohlt*, 652 F.2d 1286 (7th Cir. 1981); *Key* v. *Rutherford*, 645 F.2d 880, 885 (10th Cir. 1981); *Greminger* v. *Seaborne*, 584 F.2d 275 (8th Cir. 1978); *Lontine* v. *VanCleave*, 483 F.2d 966 (10th Cir. 1973); *Orr* v. *Thorpe*, 427 F.2d 1129 (5th Cir. 1970); *American Federation of State, Co., and Mun. Emp.* v. *Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Gerrin* v. *Hickey*, 464 F.Supp. 276 (E.D. Ark. 1979); *Atkins* v. *City of Charlotte*, 296 F.Supp. 1068 (W.D.N.C. 1969). There can also be no doubt that these same provisions which protect the right to associate also embody the parallel right *not* to associate. *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Wooley* v. *Maynard*, 430 U.S. 705 (1977); *Elrod* v. *Burns*, 427 U.S. 347 (1976); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Kolinske* v. *International Union, UAW*, 530 F.Supp. 728 (D.D.C. 1982); *Gavett* v. *Alexander*, 477 F.Supp. 1035 (D.D.C. 1979); *Petrucci* v. *Hogan*, 5 Misc.2d 480 (N.Y. Sup. Co. 1941). As the court said in *Gavett* v. *Alexander* at 1045:

> Among the rights protected by the First Amendment is that to freedom of association * * * and its corollary, the freedom *not* to be required to associate with groups holding views which an individual regards as obnoxious. * * * Similarly, the First Amendment protects the rights to contribute to political and other causes * * * as well as the right *not* to contribute.

And see, L. Tribe, *American Constitutional Law* §§ 15-18 at 974 (1978): "rights to associate with X are necessarily rights to dissociate from Y."

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977), has no effect on the rule that, in the absence of a statute permitting otherwise, public employees have a First and Fourteenth Amendment right not to join or support a labor organization.

The first paragraph of Mr. Justice Stewart's opinion in *Abood* states:

> *The state of Michigan has enacted legislation* authorizing a system for union representation of local governmental employees. A union and a local government employer are specifically permitted to agree to an "agency shop" arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues. The issue before us is whether this arrangement violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees. (431 U.S. 212.) (Emphasis added.)

And, later on in his opinion he states:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.[18] But the judgment clearly made in *Hanson* and *Street* is that such interference as exists *is constitutionally justified by the legislative assessment* of the important contribution of the union shop to the system of labor relations established by Congress. (431 U.S. 223.) (Emphasis added.)

---

[18] See *infra* at 235-238.

The footnote in this portion of the opinion refers the reader to the portion of the opinion where the court holds that a fee-equal-to-dues-agreement is unconstitutional to the extent that such fees are used for purposes other than collective bargaining, contract administration and grievance processing. From these portions of the opinion two things are clear: one, an agency shop invades First Amendment interests; and two, such invasion is constitutionally justified by the *legislative judgment* involved in the enactment of the statute. *A fortiori,* where there is no legislative judgment involved, there is no justification for the invasion and the First Amendment rights of those who object to the agency shop must prevail.

This case is no different from any other case involving the lack of exercise by a legislature of its inherent power. Where there has been no proper exercise of the power, individuals are free to do things which can be prohibited after a proper exercise of the power. Implicit in cases like *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977); *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951); and *Nebbia* v. *People of State of New York,* 291 U.S. 502 (1934), is the conclusion that, in the absence of the legislation being reviewed, the conduct complained of would have been permissible. For example, in *Breard,* if the ordinance which was there approved had not been enacted, Mr. Breard would have had the right to attempt to sell his magazines door to door without invitation from the occupants. As the dissent in that case said:

> The ordinance before us makes criminal the hitherto legitimate business practice of soliciting magazine subscriptions from door to door without prior invitation of the home owner. (341 U.S. at 645.)

In other words, the decision by the Supreme Court in *Abood* did not suddenly enlarge the executive powers of public employers in Ohio. *Compare, Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), and *Euclid* v. *Ambler Realty Company,* 272 U.S. 365 (1926), with *Eubank* v. *Richmond,* 226 U.S. 137 (1912).

It is correct to speak of these freedoms as Constitutional rights under the First and Fourteenth Amendments to the U.S. Constitution because it is these basic documents which permit us to do as we individually choose unless and until our conduct is regulated in order to serve some valid public interest. Mr. Lockwood's right not to support a labor organization is of this nature. Unless and until the Ohio Legislature says he is required to provide financial support to his union representative, he is free—that is, he has the right—to withhold such support. *Cf., Elrod* v. *Burns,* 427 U.S. 347 (1976).

2. The State Of Ohio Has Not Enacted Legislation Authorizing Agency Shop Agreements.

In 1975 Amended Substitute Senate Bill No. 70 was sent to Governor Rhodes for signature in order to become law. He vetoed it on September 19, 1975. His Veto Message is set out in the Appendix, 30a. One of his reasons for vetoing the bill was that it would have authorized agency shops. With respect to this particular provision he stated:

> When the agency shop provision of Amended Substitute Senate Bill No. 70 is considered together with the strike provision and the binding arbitration provision, the state and local governments of Ohio would be virtually stripped of any loyalty that public employees may have to their

> employers. No employee of the state, a city, a township or of any public employer in this state should be required to pay dues to any union or any organization as a condition of employment. A recent public opinion poll indicates that 78% of the people polled hold that view, and, more importantly, 75% of union families believe that public employees should not be required to pay union dues if they are not a member of the union. The purpose of state and local government is to provide services for the people. It serves no public purpose for any government to act as the collecting agent for a union or employee association. The agency shop provision in the Bill demonstrates the extent to which the majority of the General Assembly seeks to transfer the primary allegiance of state employees from the interest of the public to the interest of private employee organizations. Our system of government was not founded on such a principle and could not long endure such a transformation. (33a)

Again, in 1977, Amended Substitute Senate Bill No. 222 was sent to Governor Rhodes for signature in order to become law. On December 2, 1977 he vetoed this bill. And, again, one of his reasons for doing so was that it would have authorized agency shops. With respect to the provision in this bill he stated:

> Freedom of association is a long established principle and prerogative enjoyed by public employees. The choice to join or refrain from joining an employee organization is a freedom guaranteed by thirty-one states, and supported by an overwhelming majority of Americans as revealed in a 1977 nationwide poll. Senate Bill 222 ignores this reality by permitting agency shops whereby employees would be forced, against their will, to pay full dues to an employee organization. In this regard, the bill even fails to conform with recent U.S.

> Supreme Court decisions which permit agency shops, but require employees to pay dues equivalent only to the actual costs of administering contracts by the employee organization.
>
> The most repulsive feature of the bill would permit payments in lieu of union dues to charitable organizations approved by the employee organization, and the employment relations board from those public employees who are prohibited due to sincerely held religious belief from financially supporting employee unions. This provision, in effect, forces a citizen of this state to purchase his religious freedom, and is totally contrary to this country's cherished heritage of religious freedom. This provision of the bill requiring an employee to pay dues to a union he does not wish to join transfers the loyalty of Ohio's public employees from the public trust to the private employee organizations. (39a-40a)

The Ohio Legislature did not override the Governor's veto in either 1975 or 1977. Governor Rhodes is still the Governor of Ohio. Since 1977, the Ohio Legislature has not passed any bill containing an agency shop provision.

There are no Ohio statutes which specifically authorize or prohibit agency shops. Certainly, the three statutes cited in the majority opinion of the Ohio Supreme Court, O.R.C. §§ 3313.17, 3313.20 and 3313.47, neither specifically authorize nor specifically prohibit an agency shop. O.R.C. § 3313.17 provides that each board of education is "a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with . . . ." O.R.C. § 3313.20 authorizes boards of education to "make such rules and regulations as are necessary for its government and the government of its employees . . . ."

O.R.C. § 3313.47 empowers boards of education to manage and control their public schools. The current statutes were enacted in 1953 and their predecessors go back at least to 1926, long before there was any thought of agency shops for public employees in Ohio or anywhere else for that matter.

3. The Action Of The Supreme Court Of Ohio Is Legislative In Nature And Deprives Mr. Lockwood Of Rights Guaranteed By The First And Fourteenth Amendments To The Constitution.

Bargaining by public employers in Ohio is permitted but not required by the Ohio Supreme Court's decision in *Dayton Teachers Ass'n* v. *Dayton Board of Educ.*, 41 Ohio St.2d 127, 323 N.E.2d 714 (1975). That court's opinion permitting public employers, in performing that discretionary, non-mandatory function, to invade Mr. Lockwood's First Amendment rights is an act legislative in nature which is directly reviewable in this Court. *Lathrop* v. *Donohue*, 367 U.S. 820 (1961). There, Justice Douglas said:

> We think that the order is a "statute" for the purposes of § 1257(2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. (367 U.S. 824.)

Here, the court below determined that *Abood* "settles all relevant constitutional questions". That erroneous conclusion equates to legislation permitting agency shops. It is an act which is legislative in character and it is that act which is brought here for review pursuant to 28 U.S.C. § 1257(2). By ignoring and refusing

to address the very real constitutional question which is present, the court below, because it is not the proper agency of the state to make the decision, impermissibly invaded the right not to associate which is given to Mr. Lockwood by the First and Fourteenth Amendments. Rather than permitting such a result, it is submitted that *Abood* requires the opposite conclusion.

It should be emphasized that the Association here does not even have a statutory much less a constitutional right to bargain with the Board. *Smith* v. *Arkansas State Highway Emp. Local 1315*, 441 U.S. 463 (1979). It is Mr. Lockwood's constitutional rights which are involved, no one else's. The *Dayton Teachers Ass'n* case permits, it does not require, Ohio public employers to bargain with representatives of their employees. Any curtailment of Mr. Lockwood's First Amendment rights must survive exacting scrutiny. *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).

There are significant factual differences between this case and *Abood* as shown by the following comparison.

Abood	*Lockwood*
1. Statutory system of mandatory collective bargaining	1. No mandatory duty to bargain.
2. Agency shop specifically permitted by statute.	2. Statutes silent. Two attempts by legislature to enact statute vetoed by Governor.
3. Action by legislature.	3. Action by court.

These material factual differences make the action of the Ohio Supreme Court in this case arbitrary and capricious. It amounts to a denial of due process guaranteed to Mr. Lockwood by the Fourteenth Amend-

ment. A part of the process which is due process is that legislative decisions shall be made by legislative bodies. That is particularly true here where the Ohio Constitution specifically allocates all legislative power, except that reserved to the people, to its legislature. Ohio Constitution, Article II, Section 1. Whether to have an agency shop for public employees is particularly a legislative decision and it is a decision on which legislatures can and do differ. *Compare* the Michigan statute involved in *Abood* with 5 U.S.C. § 7102, and 39 U.S.C. § 1209(c). The State of Michigan authorizes agency shops for its employees; the United States forbids agency shops for its employees. The absence of an authorizing statute precludes a determination that the agreement here fulfills a compelling interest of the state.

Quite apropos here are Mr. Justice Holmes' remarks, dissenting, in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 41 (1928). There, he said:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

To include or not to include authority for agency shops in a state's collective bargaining system is a

legislative function. Such "line drawing" cannot constitutionally be made by a court.

The statutes "interpreted" by the Ohio Supreme Court originated in antiquity when Ohio set up its system of public education and the last major recodification of these provisions took place in 1953. To interpret these provisions as authorizing the curtailment of First Amendment interests permitted in *Abood* is an overbroad and unwarranted interpretation of an otherwise valid enactment which can and should be corrected by this Court. *City of Madison, etc.* v. *Wis. Emp. Rel. Com'n.*, 429 U.S. 167, 174, n.5 (1976).

II. The Result Below Violates Article I, Section 10, Of The Constitution.

Article I, Section 10, of the Constitution forbids the States from enacting any law which impairs the obligation of contracts. As used in this provision "State" includes its political subdivisions such as school districts. *Murray* v. *Charleston*, 96 U.S. 432 (1877); *Walsh* v. *School Dist. of Philadelphia*, 343 Pa. 178, 22 A.2d 909, *cert. denied*, 315 U.S. 823 (1941). The clause limits the power of the states to modify their own contracts. *U.S. Trust Co. of New York* v. *New Jersey*, 431 U.S. 1 (1977).

Here, on April 25 the Board entered into a contract with Mr. Lockwood pursuant to which he was to teach for the next two years. This agreement was made pursuant to the Board's statutory duty to enter into written contracts with teachers. O.R.C. § 3319.08. At that time, no collective bargaining agreement and no rule or regulation of the Board even purported to require Mr. Lockwood to pay a representation fee to

the Association. On May 16, 1978, in the performance of a non-statutory, non-mandatory, discretionary function, the Board made another contract with another private party, pursuant to which it required Mr. Lockwood to pay money to that private party if he taught in the Board's schools. In doing so it altered the terms of its prior contract with Mr. Lockwood to his detriment. Thus, a classic case of the unconstitutional impairment of a contract is presented by these facts. *U.S. Trust Co. of New York* v. *New Jersey*, 431 U.S. 1 (1977).

CONCLUSION

For the reasons stated, probable jurisdiction should be noted and full briefs on the merits should be ordered.

Respectfully submitted,

DAVID T. BRYANT
National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel For The Appellant

Of Counsel:

REX H. REED
National Right To Work Legal
Defense Foundation, Inc.

JAY TIMS
Harrington, Huxley & Smith
1200 Mahoning Bank Building
Youngstown, Ohio 44503

APPENDIX

APPENDIX

THE JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee*

v.

LOCKWOOD, *Appellant.*

[Cite as Jefferson Area Teachers Assoc. v. Lockwood (1982), 69 Ohio St. 2d .]

A teachers association, which has negotiated a collective bargaining agreement for all teachers employed by a local board of education, may assess and collect from a teacher who is not a member of the association a service fee fixed by the agreement.

(No. 81-589—Decided March 9, 1982.)

APPEAL from the Court of Appeals for Ashtabula County.

Appellant, David Lockwood, executed a teaching contract with the Jefferson Area Local Board of Education ("board") on April 25, 1978, for the 1978-79 school year. Under that contract, appellant agreed "to abide by and maintain the rules and regulations adopted by the said Board * * *."

On May 16, 1978, the board unanimously approved its Master Agreement ("agreement") with appellee, the Jefferson Area Teachers Association. Under the agreement, teachers who were not members of appellee were to pay to appellee a service fee equal to 50 percent of the amount of dues required of members in recognition of appellee's services. Appellant refused to pay the 1978-79 service fee for non-members, $83.13.

Appellee filed a small claim complaint if (*sic*) the Ashtabula County Court and requested judgment in the amount of $83.13, plus interest and costs. The trial court ruled in

favor of appellant after a trial to the court. The Court of Appeals reversed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Green, Schiavoni, Murphy, Haines & Sgambati Co., L.P.A., Mr. Barry Laine and *Mr. Hugh N. Helm, III*, for appellee.

Messrs. Harrington, Huxley & Smith, Mr. David T. Bryant and *Mr. Rex H. Reed*, for appellant.

LOCHER, J. This cause presents one issue: whether Ohio law permits appellee to assess and collect from appellant the service fee stated in the agreement.* Appellant argues that the service fee does not apply to him because the board lacked statutory authority to agree to that provision and because he had executed a contract with the board prior to the execution of the agreement. We disagree.

This court has already held that a board of education may consummate a collective bargaining agreement. "A board of education is vested with discretionary authority to negotiate and to enter into a collective bargaining agreement with its employees, so long as such agreement does not conflict with or purport to abrogate the duties and responsibilities imposed upon the board of education by

---

* *Abood* v. *Detroit Bd. of Edn.* (1977), 431 U.S. 209, settles all relevant constitutional questions. In *Abood*, the United States Supreme Court upheld the constitutionality of a Michigan statute which permitted a local government employer and a union to enter into an "agency shop" arrangement under which "every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues." *Id.*, at 211. The court approved the statutory scheme at least to the extent that nonmember contributions supported the union as an exclusive collective bargaining representative. *Id.*, at 222-224. Therefore, we need not comment further on the constitutional issue which appellant raises.

law." *Dayton Teachers Assn.* v. *Dayton Bd. of Edn.* (1975), 41 Ohio St. 2d 127, paragraph one of the syllabus. Therefore, we limit our inquiry to the propriety of the service fee provision.

In *Rehor* v. *Case Western Reserve University* (1975), 43 Ohio St. 2d 224, certiorari denied, 423 U. S. 1018, Rehor had been a tenured member of the faculty of Western Reserve University ("Western Reserve"). Western Reserve had a retirement age of 70. After the federation of Western Reserve and Case Institute of Technology, the retirement age of faculty at Case Western Reserve University ("CWRU") was 65 with an option of continued employment until age 68. After Rehor turned 68, CWRU refused to reappoint him to the faculty. This court held, in the first three paragraphs of the syllabus:

"1. Where a university faculty member is employed, using standard annual reappointment forms which do not set forth in full the terms and conditions of employment, the university's employment policies, rules and regulations become part of the employment contract between the university and the faculty member.

"2. The grant of tenure to a faculty member by a university does not preclude the university from thereafter changing the retirement age for all faculty members, including the tenured faculty member, provided the change is reasonable and uniformly applicable.

"3. A bylaw of a university, to the effect that its board of trustees shall from time to time adopt such rules and regulations governing the appointment and tenure of the faculty as the board deems necessary, includes a reservation of the right to change the university's retirement age." 43 Ohio St. 2d 224. Each of these paragraphs of the syllabus provide guidance for the cause presently before this court.

R. C. 3313.20 provides, in pertinent part: "The board of education shall make such rules and regulations as are

necessary for * * * the government of its employees * * *." Furthermore, appellant expressly agreed "to abide by and maintain the rules and regulations adopted by the [Jefferson] Board * * *." In light of *Rehor*, therefore, the later execution of the agreement between the board and appellant does not necessarily exempt appellant from the terms of the agreement.

The board is empowered to enter into contracts, R. C. 3313.17, as well as to manage and control its public schools, R. C. 3313.47. *Cf. Dayton, supra* (41 Ohio St. 2d, at 131). In this case, the board elected to negotiate exclusively with appellee. We cannot quarrel with the reasonableness of that managerial decision. Negotiating with an exclusive representative streamlines labor relations and advances the governmental interest of avoiding "[t]he confusion and conflict that could arise if rival teachers' unions * * * each sought to obtain the employer's agreement * * *." *Abood* v. *Detroit Board of Education* (1977), 431 U.S. 209, at 224.

After the agreement went into effect, appellant's salary increased from $14,880 to $16,440. His fringe benefits increased also. Appellee assessed a service fee of $83.13. In accordance with the agreement, this amount was 50 percent of that charged to members of the union and the same for *all* non-members. The board's change in policy was, therefore, "uniformly applicable." *Rehor, supra,* paragraph two of the syllabus. Appellee, therefore, is entitled to assess and collect from appellant the service fee established under the agreement.

Accordingly, we affirm the judgment of the Court of Appeals.

Judgment affirmed.

Celebrezze, C.J., W. Brown, Sweeney and C. Brown, JJ., concur.

Holmes and Krupansky, JJ., dissent.

HOLMES, J., dissenting.

The collective bargaining agreement between the Association and the Board for 1978-1979, which was ratified by the Board on May 16, 1978, contains the following provision entitled "Service Fee for Representation":

"In recognition of the Association's services to the bargaining unit, all members of the bargaining unit shall either be members of the Association or share in the financial support of the Association by paying to the Association a service fee equivalent to the amount of dues uniformly required of the members of the United Teaching Profession. Bargaining unit members may either pay directly to the Association or by dues deduction made pursuant to a properly executed Payroll Deduction Authorization Form delivered to the school Board. The payment of dues or a service fee shall be a condition of employment."

A footnote to this provision reads:

"Members of the bargaining unit under contract during the 1977-78 school year, but not members of JATA, excluding those on leaves of absence, shall contribute 50 percent of the United Teaching Profession dues to JATA as a service fee."

This type of clause is commonly referred to as an "agency shop" clause. The phrase "condition of employment" as used in this clause means that the employee's continued employment is conditional upon his paying the dues or fees involved.

In Ohio, the General Assembly has specifically provided by statute that an agency of the state, which includes school boards, is precluded from entering into an "agency shop" agreement with its employees. Accordingly, R. C. 9.41 provides, in pertinent part:

"Notwithstanding section 1321.32 of the Revised Code, the state of Ohio and any of its political subdivisions or instrumentalities may checkoff on the wages of public employees for the payment of dues to a labor organization or other organization of public employees upon written authorization by the public employee. Such authorization may be revocable by written notice upon the will of the employee."

By adopting R. C. 9.41, the General Assembly has evidenced its intent that state employers may deduct fees, such as these, from an employee's wages *only* upon the execution of the employee's revocable authorization. In other words, R. C. 9.41 precludes an agency shop.

The majority sanctions a result which the General Assembly has forbidden, without even discussing R. C. 9.41. By allowing the appellee to enforce a clause in the master contract which the board of education could not directly enforce elevates form over substance.

In *Dayton Teachers Assn.* v. *Dayton Bd. of Edn.* (1975), 41 Ohio St. 2d 127, this court did, as stated by the majority, hold that school boards have discretionary authority to bargain with representatives of their employees, and that school boards may agree to a binding collective bargaining agreement "* * * so long as such agreement does not conflict with or purport to abrogate the duties and responsibilities imposed upon such board of education by law." In the same manner, this court stated in the opinion, at page 134:

"Accordingly, it is the judgment of this court that the agreement herein is a valid and enforceable contract, and that the board is obligated to arbitrate any grievance arising thereunder where the grievance involves the application or interpretation of *a valid contractual term* and the arbitrator is specifically prohibited from making any decision which is inconsistent with the terms of the agreement or *contrary to law.*" (Emphasis added.)

Implicit in the opinion in *Dayton* is the corollary proposition that invalid terms of a collective bargaining agreement or those which are contrary to law are not enforceable.

The "condition of employment" language in this agreement being unlawful and void in Ohio, the appellant teacher should have prevailed.

I would reverse the judgment of the Court of Appeals.

Krupansky, J., concurs in the foregoing dissenting opinion.

COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT
COUNTY OF ASHTABULA

Court of Appeals Case No. 1002

THE JEFFERSON AREA TEACHERS ASSOCIATION,
Plaintiff-Appellant

-VS-

DAVID LOCKWOOD, *Defendant-Appellee*

Judges: HON. EDWIN T. HOFSTETTER, P.J.
HON. ROBERT E. COOK, J.
HON. ALFRED E. DAHLING, J.

OPINION

(Filed February 17, 1981)

Appearances:

DAVID T. BRYANT
REX H. REED
8001 Braddock Road, Suite 600
Springfield, Virginia 22160

Counsel for Amicus Curiae

STEPHEN HEDLUND
1200 National Bank Bldg.
Youngstown, Ohio 44503

Attorney for Appellee

BARRY LAINE
HUGH N. HELM, III.
4th Floor, Dollar Bank Bldg.
P.O. Box 849
Youngstown, Ohio 44501

Attorneys for Appellant

DAHLING, J.,

This is an appeal from a judgment of the Ashtabula County Court, Eastern Area, wherein the court held for defendant-Lockwood on a complaint by plaintiff-association for a service fee in the amount of $83.13.

The association entered into a contract with the school board in which Clause M provides:

> "In recognition of the Association's services to the bargaining unit, all members of the bargaining unit shall either be members of the Association or share in the financial support of the Association by paying to the Association a service fee equivalent to the amount of dues uniformly required of the members of the United Teaching Profession.* Bargaining unit members may either pay directly to the Association or by dues deduction made pursuant to a properly executed Payroll Deduction Authorization Form delivered to the school board. The payment of dues or a service fee shall be a condition of employment.
>
> ---
>
> * Members of the bargaining unit under contract during the 1977-78 school year, but not members of JATA, excluding those on leaves of absence, shall contribute 50 percent of the United Teaching Profession dues to JATA as a service fee."

Also, the teaching contract of Lockwood provides he "agrees to abide by and maintain the rules and regulations adopted by the said Board". Lockwood has a two year limited contract and is not a tenured teacher.

Lockwood's contract dated April 25, 1978 provided an annual salary of $14,880.00. However, due to the efforts of the association, his salary was increased to $16,440.00 and he received increased fringe benefits. Lockwood accepted this salary increase and fringes, but refused to pay the service fee.

The plaintiff has presented the following Assignments of Error for review:

I. The Trial Court Erred To The Prejudice Of Appellants In Ruling Appellee May Avoid The Obligation To Pay A Service Fee On Constitutional Grounds.

II. The Trial Court Erred To The Prejudice Of Appellants In Ruling That Appellee Was Not Liable For The Service Fee Because It Was A Condition Of Employment.

III. The Trial Court Erred To The Prejudice Of Appellant In Ruling That The Service Fee Was Unenforceable Because The Collective Bargaining Agreement Was Ratified After Appellee Entered An Individual Employment Contract With The Board, And Appellee Was Thereby Not Benefited Or Enriched.

These Assignments of Error are with merit.

First Assignment of Error

This court disposed of the constitutional issue in *Youngstown State University v. Robert H. Secrest*, Unreported Seventh District Court of Appeals Case No. 77 CA 163, decided November 8, 1978. We stated in *Secrest*:

> "In the recent decision of *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. CT. 1782, 52 L.Ed. 2d 26, 45 L.W. 4475 (1977), the U.S. Supreme Court disposed of appellant's constitutional claims. The high Court found constitutionally sound an "agency shop" agreement, authorized by Michigan law between local government employees and its selected union, whereby teachers who were not members of a union selected as the exclusive bargaining representative were required to pay the union a service fee equivalent to union dues.

Although Ohio has no collective bargaining statute in the public sector, a contract in the absence of such statute is not an infringement of an employee's first and fourteenth Amendment rights. Thus, *Abood* is dispositive of the alleged constitutional infirmities at bar."

Part of the underlying reasoning was expressed in *Abood*:

"The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissention within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations. *Abood v. Detroit Board of Education, supra,* at 220-21, L. Ed. 2d at 275."

Second Assignment of Error

The second Assignment of Error is with merit as plaintiff is only attempting to collect the service fee of $83.13, not have appellee terminated for failure to pay the service fee. This court ruled in Niles Classroom Teachers Association v. Donald Bofenkamp, et al., Trumbull County Court of Appeals Unreported Case No. 2625-30 of June 18, 1979, that non-payment of dues cannot serve as a basis of non-renewal or termination of employment.

Third Assignment of Error

Appellant presents an excellent analysis of this proposition in its Reply Brief which is in part as follows:

"The leading case in Ohio on public sector collective bargaining is *Dayton Classroom Teachers Association*

v. Dayton Board of Education, 41 Ohio St. 2d 127 (1975). In *Dayton*, the Court considered whether a school board was empowered to execute a collective bargaining agreement with a representative of its employee teachers. The Court concluded that the board had that authority, citing, inter alia, Ohio Revised Code Section 3313.20, which authorizes a board of education to 'make such rules and regulations as are necessary for its government and the government of its employees . . .'. In agreeing to contract terms with a representative of the teachers, a school board merely exercises its authority to enact rules and regulations for the government of its employees. *Dayton* plainly teaches that those rules and regulations are no less binding because a representative of the teachers participated in their enactment or because they appear in contract form. As the Supreme Court pointedly stated: 'Neither reason nor authority prohibits a board of education from manifesting its policy decisions in written form and calling the writing an agreement or contract.' 41 Ohio St.2d at 134. Thus, a collective bargaining agreement is board policy and constitutes a proper exercise of the authority of the board to establish rules and regulations for its employees.

Significantly, the collective bargaining agreement was so viewed by the Jefferson Board of Education. At the hearing below, its Superintendent testified:

> 'Upon ratification and approval of the master contract by the Board, that master agreement becomes part of the Board's policy . . .' Statement of Proceedings at page 2.

Thus, the contract is treated by the Jefferson Board of Education as board policy. Since the contract of teacher Lockwood expressly incorporates: 'The rules

and regulations adopted by the said board for the government of said schools', and since the terms of the master agreement constitute such rules and regulations, teacher Lockwood was obligated to comply with the terms of the master agreement, including that provision requiring nonmembers to pay a service fee.[2]

Further support for the association position is provided in *Rehor* v. *Case Western Reserve University*, 43 Ohio St. 2d 224, (1975). In that case the Supreme Court expressly stated that a contract of a university professor incorporates the then operable rules and regulations of a university.

> 'Where a university faculty member is employed, using standard annual reappointment forms which do not set forth in full the terms and conditions of employment, the university's employment policies, rules, and regulations become part of the employment contract between the university and the faculty member.' First Syllabus 43 Ohio St. 2d at 224.

Rehor further demonstrates that the board rule requiring payment of a service fee must be followed even though it was arguably enacted after Lockwood exe-

---

[2] Even if not deemed a contractual obligation, the requirement that nonmember teachers pay a service fee is a Board rule which teachers in the Jefferson district must obey. It is well settled that a board of education had broad authority in enacting rules and regulations governing the employment of teachers, *Greco* v. *Roper*, 145 Ohio St. 243 (1945), and it cannot be said that a service fee requirement is an unreasonable or improper rule, *Whipkey* v. *Youngstown State University*, *supra*, Slip Opinion at pages 6 and 7, Appendix of Amicus at pages 22, 23. Accordingly, the service fee provision, enacted pursuant to the board's rule making authority, requires teacher Lockwood to pay the service fee."

cuted his individual contract of employment. In *Rehor*, the teacher argued that the university could not, after granting a tenure contract, alter the mandatory retirement age. The Supreme Court, rejecting the argument, held:

> 'The grant of tenure to a faculty member by university does not preclude the university from thereafter changing a retirement age for all faculty members, including the tenured faculty member, provided the change is reasonable and uniformly applicable.' Second syllabus, 43 Ohio St. 2d at 224.

Similarly, the Jefferson Board can require payment of a service fee for nonmembers of the association as a rule, and its employee teachers must abide by that rule even if it is concluded that the rule was enacted after teacher Lockwood executed his individual contract of employment.

For the foregoing reasons, the judgment of the Ashtabula County Court is reversed and final judgment is awarded to plaintiff against defendant in the sum of $83.13 plus costs.

/s/ Alfred E. Dahling
ALFRED E. DAHLING, Judge

HOFSTETTER, PJ., not participating
COOK, J., Concurs with concurring opinion

THE STATE OF OHIO,
ASHTABULA COUNTY, ss.

I, hereby certify that the foregoing is a true copy of the instrument on file in this office.

/s/ Edward L. Meaney, Clerk

/s/ Carve Jokinin, Deputy

EDWARD L. MEANEY
Clerk of Courts
Ashtabula County, Ohio

A.C. 1002

THE JEFFERSON AREA TEACHERS ASSOC. v. DAVID LOCKWOOD

COOK, J. (concurring opinion)

I concur in the above opinion. I would only add two comments.

First, this court's decision in Niles Classroom Teachers Association v. Donald Bofenkamp, et al., Trumbull County Court of Appeals Unreported Case No. 2625-30 of June 18, 1979, held that the agency shop provision of the subject contract was a proper contract provision to the extent it did not conflict with or abrogate the duties and responsibilities imposed upon the board of education by law. Dayton Classroom Teachers Assn. v. Dayton Bd. of Ed. (1975), 41 Ohio St. 2d 127. In the Niles case, we held such an agency shop provision did conflict with statutory provisions as to dismissal of tenured employees and dismissal of employees for failure to "authorize a check off to pay to the Clerk-Treasurer and Association each month their representation fees." However, we did not hold such an agency shop provision was not applicable to situations other than the two mentioned above.

Second, the legal authority for appellant to bring an action against appellee for the monetary amount of the "representation fee" he had not paid is appellant's status as a third party beneficiary of the individual contract between appellee and the Jefferson Board of Education.

Appellee's contract of employment with the Jefferson Board of Education expressly incorporated "the rules and regulations adopted by the said board for the government of said schools."

The master agreement between the appellant and the Jefferson Board of Education embodied rules and regulations of the Board of Education as to personnel matters.

One of the rules of said Board, as set forth in said contract, was that non-members of the union should pay a representation fee to the union.

The rules and regulations of the Board, having been incorporated into the contract of appellee with the Board, the personnel rules and regulations of the master contract became a part of appellee's contract with the Board. Thus, appellee's contract with the Board contained the provision that appellee should pay a representation fee to the Jefferson Area Teachers Association.

Thus, the Jefferson Area Teachers Association became a third party beneficiary of the contract between appellee and the Board.

A third person for whose benefit a promise has been made by another may maintain an action thereon at law in his own name. Chitlik v. Allstate Ins. Co. (1973), 34 Ohio App. 2d 193.

/s/ Robert E. Cook
JUDGE ROBERT E. COOK

THE STATE OF OHIO
ASHTABULA COUNTY, ss.

I, hereby certify that the foregoing is a true copy of the instrument on file in this office.

/s/ Edward L. Meaney, Clerk

/s/ Carve Jokinin, Deputy

EDWARD L. MEANEY
Clerk of Courts
Ashtabula County, Ohio

IN THE ASHTABULA COUNTY COURT
EASTERN AREA
JEFFERSON, OHIO

Case No. 79-CV-I-57

JEFFERSON AREA TEACHERS ASSOCIATION, *Plaintiff*

-vs-

DAVID LOCKWOOD, *Defendant*

SUPPLEMENT DECISION

Pursuant to Plaintiff's Motion for Reconsideration or New Trial

(Filed August 8, 1979)

The decision heretofore entered after Trial on the merits of the within action is incorporated in this decision as if fully rewritten herein. However, recent developments in the Supreme Court of Ohio have rendered obsolete that portion of the decision pertaining to the constitutionality of the "Agency Shop" provisions in contracts between unions of public employees, and the State of Ohio or any of its political sub-divisions.

The aforesaid Decision is changed and/or modified pursuant to Plaintiff-JATA's Motion for reconsideration as follows:

FIRST:—It is the further holding of this Court that paragraph M of the collective bargaining agreement between it and Jefferson Area Local Board of Education is so arbitrary and unreasonable that it shocks the conscience of this Court as it should that of any red-blooded American. It is repugnant and repulsive to that principle of freedom of choice upon which this democracy of ours was built and which made this nation of ours such a great place to live and work in. Too many of our rights and privileges have suffered erosion as the result of continued sniping and

undermining by some agency or some government Bureaus who promulgate unreasonable rules and/or regulations. Let us keep intact that an individual as a person and because he is an American has certain fundamental constitutional rights—one of them being the right to refuse to pay agency shop service fees in lieu of union dues when he is not a member of and does not belong to the Union.

Page -2-

SECOND:—Paragraph M of Section III of the Master agreement between plaintiff union and Jefferson Area Local Board of Education entitled "RIGHTS OF THE ASSOCIATION" provides: "The payment of dues or a service fee shall be a condition of employment". This terminology attempts to make the payment of the agency service fee a condition of continued employment as applied to Defendant. It is the opinion of this Court that the aforesaid provision exceeds the authority of Jefferson Area Local Board of Education; it is arbitrary and unreasonable; it is contrary to public policy and therefore is illegal and unconstitutional.

THIRD:—Certain individual rights have accrued to Defendant because he is a tenured teacher and it is the opinion of this Court that contractual agreements between Jefferson Area Local Board of Education and Plaintiff-JATA cannot adversely affect or abrogate Defendant's individual rights as a teacher—which rights are mandated by Ohio Statutory Laws. These rights are, therefore, not subject to change by separate action by Jefferson Area Local Board of Education in entering into a contract with Plaintiff-JATA. Non-payment of union dues or non-payment of Agency Service Fees cannot serve as a basis for non-renewal or termination of a tenured Teacher's employment. It is the further opinion of this Court that to the extent that Section III Paragraph M requires payment of an agency service fee (as a condition of employment) on the part of Defendant is violative of Chapter

3319 (Continuing Service Requirements) of the Ohio Revised Code.

FOURTH:—This Court further finds that since Defendant-Teacher's relationship with Jefferson Area Local Board of Education as an employee is controlled firstly, by Tenure and secondly by the Contract of employment he negotiated and entered into with Jefferson Area Local Board of Education—BEFORE THE EFFECTIVE DATE OF THE MASTER AGREEMENT entered into by Plaintiff-JATA

Page -3-

and Jefferson Area Local Board of Education. This Court refuses to apply the Terms of the Master Agreement retroactively. The fact that Defendant-Teacher's individual agreement entered into by him with Jefferson Area Local Board of Education on April 25, 1978, requires him "to abide by and maintain the rules and regulations adopted by Jefferson Area Local Board of Education for the government of said schools of said district" does not require conformity with contractural obligations entered into by Jefferson Area Local Board of Education with Plaintiff-JATA on May 16, 1978.

For the reasons stated herein and the reasons given in the opinion filed May 23, 1979, in this case, the Court again finds in favor of Defendant-Teacher.

Plaintiff JATA's motion for a new Trial is overruled.

Costs assessed against Plaintiff-JATA.

/s/ Joseph A. West
JOSEPH A. WEST, Judge

Dated: August 8, 1979

IN THE ASHTABULA COUNTY COURT
EASTERN AREA
JEFFERSON, OHIO

Case No. 79-CV-I-57

JEFFERSON AREA TEACHERS ASSOCIATION, *Plaintiff*

-vs-

DAVID LOCKWOOD, *Defendant*

DECISION

(Filed May 23, 1979)

This Action is brought by Jefferson Area Teachers Association, a union of Teachers, (hereinafter referred to as "Plaintiff-JATA") in the Small Claims Division against Defendant David Lockwood (hereinafter referred to as "Defendant-Teacher") alleging that Defendant-Teacher owes Plaintiff-JATA on a claim referred to in the complaint as a Service Fee for the academic year 1978-1979.

Plaintiff-JATA is recognized by the Jefferson Area Local Board of Education as the sole and exclusive bargaining agent for all teachers within the Bargaining Unit. Defendant-Teacher is employed by the Jefferson Area Local Board of Education to teach in its public schools. Defendant-Teacher is not a member of Plaintiff-JATA and refuses to pay the Service Fee charged by Plaintiff-JATA.

Plaintiff-JATA contends that as the exclusive bargaining agent for all the teachers it entered into a collective bargaining agreement between it and Jefferson Area Local Board of Education. (See Plaintiff-JATA's Exhibit #1 attached hereto.) Plaintiff-JATA cites Section III, Paragraph M which reads as follows:

> M. SERVICE FEE FOR REPRESENTATION
>
> In recognition of the Association's services to the bargaining unit, all members of the bargaining unit shall

either be members of the Association or share in the financial support of the Association by paying to the Association a service fee equivalent to the amount of dues uniformly required of members of the United Teaching Profession.*

Page -2-

Bargaining unit members may either pay directly to the Association or by dues deduction made pursuant to a properly executed Payroll Deduction Authorization Form delivered to the School Board. The payment of dues or a service fee shall be a condition of employment.

---

* Members of the bargaining unit under contract during the 1977-78 school year but not members of JATA, excluding those on leaves of absence, shall contribute 50% of the United Teaching Profession dues to JATA as a service fee.

Plaintiff-JATA contends that Defendant-Teacher received the benefits of the collective Bargaining Agreement negotiated by it and that subject provision gives Plaintiff-JATA the legal basis to bring this Small Claim Action against Defendant-Teacher for 50% of the Dues paid by teachers who are members of Plaintiff-JATA.

Plaintiff argues as a proposition of Law that provisions for a so-called "Agency Shop" have been ruled by the U.S. Supreme Court as being Constitutional and cites the case of *Abood* vs. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 72 L.Ed. 2d 261, at 273 n. 10 (1977), and 55 Cornell L. Rev. 547, n. 1, for recitation of agency shop definition.

However, the *Abood* vs. *Detroit Board of Education* case is not controlling in Ohio because the decision therein involves a Michigan Statute which made it legal in Michigan for Collective Bargaining Agreements involving public

employees to provide therein requiring them to pay a Service Fee even if they were not members of the Union under the Agency Shop principle. There is no similar Statutory definition in the Ohio Statutes defining the authorized scope of dealing between a public employer and a bargaining agent for its public employees.

Plaintiff-JATA in pursuing its theory of the law in this case devoted a major portion of its time at the trial of this matter advancing the proposition that teachers of Jefferson Area Local Board of Education who are not members of the union but who receive the benefits of the union Collective Bargaining

Page -3-

Negotiations should have to pay a service fee to the Bargaining Unit, labelling non-members as "free riders". See Plaintiff-JATA's Trial Brief submitted to this Court and attached hereto.

This Court rejects Plaintiff-JATA's argument that the Agency Shop principle is controlling in this case. The issue presented to this Court in this case by Plaintiff-JATA is the one presented by the pleadings and the evidence.

Defendant-Teacher has for sometime been employed by the Jefferson Area Local Board of Education as a teacher in its Public Schools pursuant to Teacher's Contracts entered into between Defendant-Teacher and the Jefferson Area Local Board of Education. The evidence in the case is that on April 25, 1978, Defendant-Teacher and the Jefferson Area Local Board of Education entered into a Teacher's contract for the school year 1978-1979, providing for a specified fixed sum of money as compensation to be paid to Defendant-Teacher. (See Plaintiff-JATA's Exhibit #3 attached hereto.) The evidence further shows that the Agreement negotiated by Plaintiff-JATA with the Jefferson Area Local Board of Education was not finalized until May 16, 1978. (See Plaintiff-JATA's Exhibit #2 attached hereto.)

Therefore it is the holding of this Court that Defendant-Teacher's salary was fixed by and is the product of the Teacher's Contract he entered into on April 25, 1978. Since it cannot be said that Defendant-Teacher is enriched by or benefitted by the Agreement negotiated by Plaintiff-JATA, Plaintiff-JATA's claim for a Service fee is not well founded and therefore is not allowed. Verdict for Defendant-Teacher. Costs are assessed against Plaintiff-JATA.

/s/ Joseph A. West
JOSEPH A. WEST, Judge

Dated: May 23, 1979

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1982 TERM*
City of Columbus. *To wit: March 9, 1982*

No. 81-589

JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee,*

vs.

DAVID LOCKWOOD, *Appellant.*

APPEAL FROM THE COURT OF APPEALS
for Ashtabula County

(Filed March 29, 1982)

This cause, here on appeal from the Court of Appeals for Ashtabula County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the ASHTABULA COUNTY COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for ASHTABULA County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .... day of March 23, 1982.

THOMAS L. STARTZMAN, *Clerk*

/s/ Sam F. Adkins, *Deputy*

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1982 TERM*
City of Columbus. *To wit: March 9, 1982*

No. 81-589

JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee,*
vs.
DAVID LOCKWOOD, *Appellant.*

MANDATE

(Filed March 29, 1982)

To the Honorable ASHTABULA COUNTY COURT

Within and for the County of ASHTABULA, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN,
Clerk

March 23, 1982

THOMAS L. STARTZMAN

/s/ Sam F. Adkins, *Deputy*

Record of Costs

Docket Fee $27.00 Paid by National Right to Work Legal Defense Foundation, Inc.

IN THE SUPREME COURT OF OHIO

No. 81-589

THE JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee,*

vs.

DAVID LOCKWOOD, *Appellant.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed May 10, 1982)

Pursuant to United States Supreme Court Rule 10, notice is hereby given that David Lockwood appeals to the Supreme Court of the United States from the final judgment entered by the Supreme Court of Ohio affirming an award of damages to the Jefferson Area Teachers Association entered in this action on March 9, 1982.

This appeal is taken pursuant to the provisions of 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/ David T. Bryant
DAVID T. BRYANT
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Mr. Lockwood

Certificate of Service

I certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was served this 5th day of May, 1982 by depositing it in a United States mailbox, with first-class postage prepaid, addressed to each of the following:

Dennis Haines, Esquire
Green, Schiavoni, Murphy, Haines
& Sgambati
4th Floor, Dollar Bank Building
Youngstown, Ohio 44503

Hon. William J. Brown
Attorney General of Ohio
State Capitol
Columbus, Ohio 43215

Mr. Edward Meany
Clerk of Court
Ashtabula County Court
25 West Jefferson Street
Jefferson, Ohio 44047

/s/ David T. Bryant
DAVID T. BRYANT

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO
COUNTY OF ASHTABULA, SS.

THE JEFFERSON AREA TEACHERS ASSOCIATION,
Plaintiff-Appellant

-VS-

DAVID LOCKWOOD, *Defendant-Appellee*

NOTICE OF APPEAL

(Filed in the Court of Appeals on March 12, 1981)

The Defendant-Appellee hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Court of Appeals of Ashtabula County, Ohio entered on February 17, 1981 amending the judgment of the Ashtabula County Court, Eastern Area. This case involves a substantial constitutional question.

/s/ David T. Bryant
DAVID T. BRYANT
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510

/s/ Eldon S. Wright (by DTB)
ELDON S. WRIGHT
1200 Mahoning Bank Bldg.
Youngstown, OH 44503
(216) 744-1111

Attorneys for Cross-Appellants

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1981 TERM*
City of Columbus. *To wit: June 10, 1981*

No. 81-589

THE JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee,*

vs.

DAVID LOCKWOOD, *Appellant.*

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS for Ashtabula County TO CERTIFY ITS RECORD

(Filed June 15, 1981)

It is ordered by the Court that this motion is allowed.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 10th day of June, 1981.

THOMAS L. STARTZMAN, *Clerk*

/s/ Sam F. Adkins, *Deputy*

STATE OF OHIO

EXECUTIVE DEPARTMENT

OFFICE OF THE GOVERNOR

Columbus

VETO MESSAGE
AMENDED SUBSTITUTE SENATE BILL NO. 70

Pursuant to Article II, Section 16 of the Constitution of Ohio, I return herewith to the Clerk of the Senate, for presentation to the Senate, Amended Substitute Senate Bill No. 70 which I disapprove and have not signed.

The majority of the General Assembly, in an effort to "get something passed", has sent to me Amended Substitute Senate Bill No. 70. Although the Bill, in its present form, is a substantial improvement over the original Senate Bill No. 70, it falls far short of meeting our responsibility to provide the atmosphere in which public employees can be most productive. If Amended Substitute Senate Bill No. 70 is permitted to become law, Ohio will take a long step backward in providing uninterrupted, efficient services for the people of this State.

When the action of a majority of the General Assembly is viewed in light of the fact that the average monthly earnings of state, municipal, township and school employees have more than doubled from 1963-73, and when public employees are earning more than a person similarly situated in the private sector, it is impossible to justify the radical collective bargaining bill you have sent to me for approval. The Bill represents a total rejection of the basic purpose of state and local government—to provide those services for our citizens that they cannot adequately provide for themselves. Amended Substitute Senate Bill No. 70 is in direct conflict with that purpose, because it shifts from elected and appointed public officials to private employee associations and organizations, much of the authority to make decisions for the people.

My specific reasons for disapproving Amended Substitute Senate Bill No. 70 are as follows:

The Right to Strike

The primary argument for the right to strike is that employees in the private sector have such a right, and therefore the right to strike should be legalized for public employees. Such an argument fails to acknowledge a very important distinction between private employment and public employment.

It is a distinction that goes to the very heart of our representative form of government. When the employees of a private company strike, the employer, as well as the striking employees, are forced to make an *economic* decision. The length of the strike is determined by economic factors over which the employer and the striking union have control. The primary impact is upon the two parties to the strike. The impact upon the general public is to force them to search in the market place for another product or another service during the strike. In contrast, a strike against a public employer cannot be met by an increase in the price of a product or service or a reduction in profit. Because the primary purpose of a public strike is to bring to a halt the operations of government, the primary impact of such a strike is upon those who are paying to have the services of government provided them—the taxpayers. When a school is closed, when the garbage piles high, when the entrances to state parks are blocked by pickets, the persons who pay for, and rightfully expect to receive governmental services, have no market place to purchase similar services. A government that is paralyzed by the picket line is a government that breaches its faith with the people.

In the words of Franklin D. Roosevelt,

> "A strike of public employees manifests nothing less than an intent on their part to obstruct the operations

of government until their demands are satisfied. Such action looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable."

It is not surprising that only seven states currently permit a limited right to strike by public employees, and 43 specifically prohibit public employee strikes. In Pennsylvania, after the passage of the highly-touted collective bargaining bill for public employees, strikes by school employees alone increased from 36 in the 1971-72 school year to 59 during 1974, and already in the current school year, Pennsylvania has recorded 41 work stoppages of school employees, compared with only three in Ohio. The facts do not bear out the claim that the granting of the right to a limited strike will decrease the frequency of strikes. Public employees have the benefit of civil service hearings, merit promotions, and retirement programs, all provided by state legislation. They also have considerably more protection against lay-offs due to recessions than employees in the private sector. With such benefits, they are not "second-class employees" and do not need the right to strike to put them in parity with private-sector employees.

Mandatory Arbitration

The final step of the impasse procedure provided by the Bill would remove from elected legislators, councilmen, school boards, and other public officials, considerable control over the cost and quality of public services. An arbitrator who has the authority to bind elected officials to his final award assumes much of the sovereignty of government that the voters have entrusted to elected officials. Although Amended Substitute Senate Bill No. 70 would require an arbitrator to consider the cost to the taxpayer resulting from his award, the experience of such awards clearly indicates that arbitrators seldom consider such

factors. Mandatory binding arbitration gives an arbitrator, over whom no one has control, the authority to determine the factors that influence an operating budget and the allocation of tax revenues. When that authority is shared with an organization that is representing only its own self-interest, public officials thereby forfeit a substantial portion of their constitutional duties. I cannot approve the mandatory binding arbitration provided for in this Bill.

Agency Shop

When the agency shop provision of Amended Substitute Senate Bill No. 70 is considered together with the strike provision and the binding arbitration provision, the state and local governments of Ohio would be virtually stripped of any loyalty that public employees may have to their employers. No employee of the state, a city, a township or of any public employer in this state should be required to pay dues to any union or any organization as a condition of employment. A recent public opinion poll indicates that 78% of the people polled hold that view, and, more importantly, 75% of union families believe that public employees should not be required to pay union dues if they are not a member of the union. The purpose of state and local government is to provide services for the people. It serves no public purpose for any government to act as the collecting agent for a union or employee association. The agency shop provision in the Bill demonstrates the extent to which the majority of the General Assembly seeks to transfer the primary allegiance of state employees from the interest of the public to the interest of private employee organizations. Our system of government was not founded on such a principle and could not long endure such a transformation.

Preference of Agreements

Another provision, not found in the law of any other state, provides as follows:

> In the event of a conflict between an agreement between an employee organization and a public employer and the provisions of any law or ordinance pertaining to wages, hours, terms, and conditions of employment, the provisions of the agreement shall prevail; . . . (Lines 747-753)

In addition to its questionable constitutionality, such a provision imposes serious practical problems upon every branch of government in this State. One example is the conflict that would exist between the statutory requirement that school-system personnel certify the adequacy of funds before entering a contract and an arbitrator making an award that exceeds the revenue of the school district. In such a case, the Board of Education must choose between the possibility of personal liability under the certification statute, or prosecution for failure to implement the arbitrator's award. The potential impact of hundreds of agreements pre-empting existing and regularly constituted law could have serious long-range consequences on the management of government in this State.

In addition to the foregoing, there are other reasons for disapproving the collective bargaining Bill. Where other states provide for ratification of collective bargaining agreements by the employees for whose benefit such agreements are purportedly made, Amended Substitute Senate Bill No. 70 places no such confidence in public employees.

The five members of the State Employment Relations Board would each be paid in excess of $32,000 per year for providing no benefit to the taxpayers of Ohio. Such a cost cannot be justified at a time when state revenues are insufficient to meet current demands for services, and unemployment is in excess of 8%. Another deficiency of the

Bill is the absence of sanctions or penalties upon an employee organization for illegal activity. The Bill should provide for de-certification of such an organization—as in New Hampshire—or for the imposition of penalties—as in Florida.

If Amended Substitute Senate Bill No. 70 were permitted to become law, it would substantially increase the cost of government by implanting a layer of employee organizations upon the persons elected and appointed to operate the government for the taxpayers. It will impose a system of collective bargaining upon cities and villages, many of whom have no need for such legislation, and will saddle them with another heavy burden that will ultimately result in an increase in local taxes. I cannot approve a Bill that would turn over to the leaders of employee organizations who are isolated from the vote of the taxpayers, the authority for determining public policy.

For the foregoing reasons, I urge the General Assembly to sustain my veto of Amended Substitute Senate Bill No. 70.

In Witness Whereof, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 19th day of September, in the Year of Our Lord, One Thousand Nine Hundred and Seventy-Five.

/s/ James A. Rhodes
Governor

(Seal)

STATE OF OHIO

EXECUTIVE DEPARTMENT

OFFICE OF THE GOVERNOR

Columbus

VETO MESSAGE
AMENDED SUBSTITUTE SENATE BILL NO. 222

Pursuant to Article II, Section 16, of the Constitution of Ohio, I return herewith to the Clerk of the Senate, for presentation to the Senate, Amended Substitute Senate Bill 222, which I disapprove and have not signed.

I have long supported the right of public employees to negotiate with their employers, a legal right Ohio's public employees have enjoyed for several years. Even today, almost one half of Ohio's state or local public employees are legally engaged in some form of collective bargaining. However, public employee collective bargaining must be conducted and accomplished in a manner compatible with representative and democratic government. Any legislation delegating collective bargaining responsibilities must strike a fair and equitable balance between public employees, employers, and the taxpayers of Ohio who pay for governmental services.

In my veto message of similar legislation two years ago, I objected to several provisions which I believed were not in the best interest of Ohio's public employees, employers, and the tax paying citizens. Several of those objections; the right to strike, binding arbitration, and preemption of negotiated agreements over law, have been modified by the General Assembly in Senate Bill 222. However, most of these modifications are at best only superficial, and would not alleviate the dangerous and costly consequences that could result from Senate Bill 222.

The goal of any collective bargaining bill must be to create a healthy and productive atmosphere for negotiations between employers and employees, while simultaneously guaranteeing to the tax paying public continued and uninterrupted services for which they have paid tax dollars. Unfortunately, the General Assembly has again sent to me legislation which falls short of this goal.

My specific reasons for disapproving Amended Senate Bill 222 are the following:

Right to Strike

Although Senate Bill 222 does not extend the right to strike to police and fire personnel and guards at state institutions, it would permit all other public employees to stop the public's work by a strike. The right to strike would be extended to almost all personnel in our mental institutions, to school employees, employees at all levels of government who issue checks to people who depend upon government programs to live, employees responsible for vital water, sanitation, and utility services, medical personnel in public hospitals, employees responsible for maintaining safe and hazard-free streets and highways, and public transit employees responsible for necessary public transportation. The bill again fails, as did the previous one, to recognize the critical distinction between employment in the public and private sectors. Labor procedures found in the private sector, such as strikes, cannot automatically be transferred to the government sector without creating severe hardships.

Strikes against government and the public have but one end, the total disruption and interruption of public services, whereas strikes against a private business are designed to force certain economic decisions. If the employees of an auto manufacturer strike, and certain automobiles are not produced and sold, the public can shift its purchasing power to a competitor. This is an accepted economic reality in

the private sector. But when schools are closed by a strike, when children are locked outside the school doors, when garbage piles high and pollutes the streets, when patients in mental institutions are left unattended, the taxpayer who pays for and expects these services has no where else to buy similar services.

To permit strikes against the government simply ignores the basic fact that government is responsible to the people through the ballot box. The public representatives are elected at all levels of government and are responsible for carrying out the functions which are proper for government to discharge. To permit these decisions to be coerced through the threat of, or the existence of a strike, is to abdicate the proper role of the elected representatives in our government. Public employment is a trust, shared by employees and the citizens. A strike against any government agency is a strike against the public. There is no right for a government to put a picket line between itself and the taxpayers.

Experiences of other states clearly prove that giving public employees the right to strike increases the incidence of strikes. As one example, during the twelve years prior to the passage of Pennsylvania's collective bargaining law, there were seventy-two strikes or six per year involving four thousand workers. During the four years after the law's passage, the number of strikes increased to two hundred ninty-two, or seventy-three per year, involving one hundred seventeen thousand workers and 1.5 million man days lost.

Binding Arbitration

Binding arbitration would be the final step in the impasse procedure for public safety forces, and could be available for other categories of employees. Amendments to the bill would, in certain situations, permit the legislative authority to reject an arbitrator's award. This provision is unfair

to employees because it binds them to the award while permitting a city council or school board to reject it. The rules of collective bargaining should apply equally to both sides of the bargaining table.

By its very nature, binding arbitration removes responsibility for decision making from the hands of those elected by the tax payers, be they city or village council members, school board members, or members of the General Assembly, and misplaces that authority in the hands of an outside arbitrator unaccountable to the taxpayers.

Even though the bill would ostensibly require an arbitrator to consider several factors in determining an award, the evidence from other states which currently have such legislation has been that arbitrators seldom consider local budgetary or other legal responsibilities. Even the author of Pennsylvania's arbitration law, after dealing with arbitration for several years, urged the General Assembly to reject binding arbitration for Ohio.

The AFL-CIO, in July, 1976 recommended to the Republican and Democratic National Platform Committees that they adopt the following statement:

> "Compulsory arbitration is incompatible with a free labor movement and free collective bargaining, and is repugnant to all who love liberty."

The President of the American Federation of State, County, and Municipal Employees also recently told the association's convention:

> "Compulsory arbitration is the absolute negation of collective bargaining."

Agency Shop

Freedom of association is a long established principle and prerogative enjoyed by public employees. The choice to join or refrain from joining an employee organization is

a freedom guaranteed by thirty-one states, and supported by an overwhelming majority of Americans as revealed in a 1977 nationwide poll. Senate Bill 222 ignores this reality by permitting agency shops whereby employees would be forced, against their will, to pay full dues to an employee organization. In this regard, the bill even fails to conform with recent U. S. Supreme Court decisions which permit agency shops, but require employees to pay dues equivalent only to the actual costs of administering contracts by the employee organization.

The most repulsive feature of the bill would permit payments in lieu of union dues to charitable organizations approved by the employee organization, and the employment relations board from those public employees who are prohibited due to sincerely held religious belief from financially supporting employee unions. This provision, in effect, forces a citizen of this state to purchase his religious freedom, and is totally contrary to this country's cherished heritage of religious freedom. This provision of the bill requiring ar employee to pay dues to a union he does not wish to join transfers the loyalty of Ohio's public employees from the public trust to the private employee organizations.

In addition to the provisions discussed above, several other of the bill's sections raise serious doubts about its merits.

The bill would establish three new boards and commissions, two with paid, full time staffs at a time when our efforts should be directed at stopping the costly growth of the state bureaucracy.

At a time when other states are revising their collective bargaining laws to specify that existing and future laws prevail over any conflicts resulting from negotiated contracts, the General Assembly has again passed a bill that

would cause contracts to preempt laws enacted subsequent to the ratification of contract. Elected representatives, including members of the General Assembly, are responsible for passing laws, and those laws are supreme. This provision would simply abdicate that responsibility by transferring the state's sovereign authority to a group of employee or employer negotiators.

The bill would mandate additional costs on all segments of government at a time when many cities, school boards, and some counties are struggling to maintain their current level of services. They should be left alone. They should be permitted to continue or to develop the collective bargaining process that best suits their community. If a state wide procedure for collective bargaining is to be adopted it should be by a vote of all the people through an Initiative.

For the foregoing reasons, I have vetoed Amended Substitute Senate Bill 222 and urge the General Assembly to sustain by veto.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to be affixed at Columbus, this 2nd day of December, in the Year of Our Lord, One Thousand Nine Hundred and Seventy-seven.

/s/ James A. Rhodes
Governor

(Seal)

Office - Supreme Court, U.S.
FILED
AUG 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2236

In THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID LOCKWOOD,

Appellant,

v.

JEFFERSON AREA TEACHERS ASSOCIATION,

Appellee.

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT BELOW

DENNIS HAINES
BARRY LAINE
GREEN, SCHIABONI, MURPHY, HAINES & SGAMPATTICO, L.P.A.
P.O. Box 849
4th Floor
Dollar Bank Building
Youngstown, Ohio 44501
(210) 743-5101

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Appellee

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Is a service fee (*i.e.*, an agency shop) provision in a collective bargaining agreement between a public school district and the union recognized as the exclusive representative of its teachers unconstitutional *unless* it is expressly authorized by a state statute, as opposed to being authorized by an organ of state government other than the legislature or by a judicial construction of state statutes that are not explicit on the point?

2. Is a teacher's individual employment contract with a public school district unconstitutionally impaired if he is held subject to the terms of a subsequently executed collective bargaining agreement between the district and the union recognized as the exclusive representative of its teachers, if the terms of the individual employment contract itself, well-settled principles of state law, and the understanding of the teacher at the time he entered into the individual employment contract, all contemplate that the collective bargaining agreement would take precedence?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Facts	1
B. Proceedings Below	4
ARGUMENT	6
I. This Court's Decision in *Abood v. Detroit Board of Education* is Dispositive of the Facial Constitutionality of the Service Fee Provision in Question	6
A. Authorization by the state legislature is not a *sine qua non* for the facial constitutionality of a service fee provision in a public sector collective bargaining agreement	7
B. Assuming, *arguendo*, that a service fee provision in a public sector collective bargaining agreement is unconstitutional unless it is authorized by the state legislature, the necessary authorization exists here	11
II. Inasmuch as appellant's individual employment contract was not impaired, this appeal does not present any question under the Contract Clause	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*
Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 15
Breard v. Alexandria, 341 U.S. 622 (1951) 8, 10
City of Madison, etc. v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 12, 15
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 10
Dayton Teachers Association v. Dayton Board of Education, 41 Ohio St. 2d 127 (1975) 13
El Paso v. Simmons, 379 U.S. 497 (1965) 15
Girouard v. United States, 328 U.S. 61 (1946) 12
Grayned v. City of Rockford, 408 U.S. 104 (1972) .. 10
Hale v. State Board, 302 U.S. 95 (1937) 15
Harrah Independent School District v. Martin, 440 U.S. 194 (1979) 10
Hughes v. Superior Court, 339 U.S. 460 (1950) 9
Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) 10
Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) 15
J. I. Case Co. v. Labor Board, 321 U.S. 332 (1944) .. 16
Jackson Transit Authority v. Amalgamated Transit Union, 50 U.S.L.W. 4603 (U.S. June 7, 1982) 12
Kelley v. Johnson, 425 U.S. 238 (1976) 10
King Manufacturing Co. v. Augusta, 277 U.S. 100 (1928) 12
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 10
Missouri ex rel. Hill v. Dockery, 191 U.S. 165 (1903) 12
Murdock v. City of Memphis, 20 Wall. 590 (1875) .. 12
Rehor v. Case Western Reserve University, 43 Ohio St. 2d 224, cert. denied, 423 U.S. 1018 (1975) 5, 14
Reinman v. Little Rock, 237 U.S. 171 (1915) 11
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 15

TABLE OF AUTHORITIES—Continued

	Page
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	10
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	10
Constitution, Statutes and Rules	
U.S. Const. Art. I, § 10	15
Michigan Comp. Laws § 432.210(1)(c)	6
U.S. Supreme Court Rules, Rule 16.1(b)	1

In The

Supreme Court of the United States

October Term, 1982

No. 81-2236

David Lockwood,

Appellant,

v.

Jefferson Area Teachers Association,

Appellee.

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS APPEAL OR TO AFFIRM THE JUDGMENT BELOW

Appellee Jefferson Area Teachers Association moves to dismiss this appeal from the judgment of the Supreme Court of Ohio, dated March 9, 1982, on the ground that the appeal does not present a substantial federal question, or alternatively, to affirm that judgment. *See* Rule 16.1(b) of this Court's Rules.

STATEMENT OF THE CASE

A. Facts

On April 25, 1978, appellant David Lockwood entered into an individual employment contract with the Jefferson (Ohio) Area Local Board of Education (Board), pursuant to which he was employed as a teacher for the 1978-79 school year. The contract was a standard, one-page

form that was used by most boards of education in the area. It provided in its entirety as follows:

> An Agreement entered into between David Lockwood of Rt. # 1, Box 97, Andover, Ohio, and the Board of Education of Jefferson Area Local School District, Ashtabula County, Ohio, the said teacher hereby agrees to teach in the public schools of said district for a term of two years, and also agrees to abide by and maintain the rules and regulations adopted by the said Board for the government of said schools of said district. And in consideration of such services, the said Board of Education agrees to pay said teacher for the school year 1978-1979, the sum of fourteen thousand eight hundred eighty and no/100 dollars. Entered into this 25th day of April, 1978.[1]

At the time appellant entered into the aforesaid contract, the Board was engaged in collective bargaining with appellee Jefferson Area Teachers Association, which had been officially recognized by the Board "as the sole and exclusive bargaining agent for all teachers . . . ." Article I, Section A, of the collective bargaining agreement, set forth in Juris. Stat. at 5. Appellant was aware that such collective bargaining was taking place and that any agreements reached between the Board and appellee would apply to him, the terms of his individual employment contract notwithstanding.[2]

---

[1] On the same date, appellant also entered into a supplemental contract with the Board in which he agreed to supervise certain extracurricular activities for an additional stipend. This supplemental contract is not relevant to this appeal.

[2] Lockwood so testified at trial. *See* Statement of Proceedings, submitted to the Ashtabula County Court by appellee (appellant in that court), and approved by that court, at 24. As the evidence showed, collective bargaining between the Board and appellee traditionally has been commenced during the school year preceding the effective date of the collective bargaining agreement ultimately entered into. While collective bargaining is underway, individual employment contracts (with salaries that are based on the salary

On May 16, 1978, the Board and appellee entered into a collective bargaining agreement covering the 1978-79 school year. This was a comprehensive agreement that dealt in detail with the salaries, hours, and working conditions of appellant and all other teachers employed by the Board. According to the salary schedule in the collective bargaining agreement, appellant's salary for the 1978-79 school year was $16,440, rather than the $14,880 provided for in his individual employment contract. Throughout the school year, the Board paid the larger amount to appellant and he accepted it without objection. The economic fringe benefits provided to the teachers by the collective bargaining agreement exceeded by some $1,680 the benefits to which they were entitled under the collective bargaining agreement that was in effect at the time appellant entered into his individual employment contract. Throughout the 1978-79 school year, appellant accepted, again without objection, the improved economic fringe benefits.

There was in fact only one provision in the entire collective bargaining agreement in regard to which appellant lodged a protest: specifically, Article III, Section M, which read in relevant part as follows:

> In recognition of the Association's services to the bargaining unit, all members of the bargaining unit shall either be members of the Association or share

---

schedule in effect at that time) are distributed to the teachers. But the teachers are in fact paid and otherwise governed in accordance with the terms of the collective bargaining agreement. The Superintendent of Schools explained the process as follows:

> "Upon ratification and approval of the master agreement by the Board, that master agreement becomes part of the Board's policy, and the Board is obligated to comply with its terms and conditions and provide the benefits contained in that agreement to its certified teachers. Accordingly, all terms and conditions of the master contract become a part of the individual employment agreements between the Board and its certified teachers . . . ." Statement of Proceedings, *supra*, at 20.

> in the financial support of the Association by paying to the Association a service fee . . . .

Set forth in Juris. Stat. at 5-6. Appellant was not a member of appellee, and under this provision he was obligated to pay a service fee of $83.13 for the 1978-79 school year, which was 50% of the dues required to be paid by members. Appellant refused to pay the fee.

B. Proceedings Below

In order to collect the service fee from appellant, appellee instituted an action in the Small Claims Division of the Ashtabula County Court, seeking judgment in the amount of $83.13, plus interest and costs. On May 23, 1979, that court denied relief, but on February 17, 1981 its judgment was reversed by the Ashtabula County Court of Appeals. The latter court entered judgment in favor of appellee for $83.13, plus costs.

On appeal, the Ohio Supreme Court affirmed the judgment of the court of appeals. In rejecting appellant's contention that the Board lacked authority under Ohio law to agree to the service fee provision, the Court stated initially that the Ohio statutes which set forth the general powers and responsibilities of a local board of education authorize it to enter into a collective bargaining agreement with the union recognized as the exclusive representative of its teachers "so long as such agreement does not conflict with or purport to abrogate the duties and responsibilities imposed upon the board of education by law." Appendix to Juris. Stat. (hereinafter "App.") at 2a-3a. Applying this principle to the issue before it, the Court held that the Board had statutory authority to enter into the challenged service fee provision.

With respect to Lockwood's contention that the service fee provision violated his rights under the First and Fourteenth Amendments to the United States Constitu-

tion, the Ohio Supreme Court stated that "*Abood v. Detroit Bd. of Edn.* (1977), 431 U.S. 209, settles all relevant constitutional questions." App. at 2a. It elaborated as follows:

> In *Abood*, the United States Supreme Court upheld the constitutionality of a Michigan statute which permitted a local government employer and a union to enter into an "agency shop" arrangement under which "every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee equal in amount to union dues." *Id.* at 211. The court approved the statutory scheme at least to the extent that non-member contributions supported the union as an exclusive collective bargaining representative. *Id.* at 222-224. Therefore, we need not comment further on the constitutional issue which appellant raises.

Id.

In response to appellant's argument that the service fee provision unconstitutionally impaired his individual employment contract, the Ohio Supreme Court began by citing its 1975 decision in *Rehor v. Case Western Reserve University*, 43 Ohio St. 2d 224, *cert. denied*, 423 U.S. 1018 (1975). The Court had held in *Rehor* that, as a matter of Ohio law, when a faculty member at a university enters into an individual employment contract " 'which do[es] not set forth in full the terms and conditions of employment, the university's employment policies, rules and regulations,' " even if adopted subsequent to the execution of the individual contract, " 'become part of the employment contract between the university and the faculty member.' " App. at 3a. "In light of *Rehor* . . .", the Court said, appellant's individual employment contract "does not necessarily exempt [him] from the terms of the [collective bargaining] agreement." App. at 4a. The Court also noted that appellant, in his individual employment contract, expressly had agreed "to abide by and

maintain the rules and regulations adopted by the . . ." Board, and the provisions of the collective bargaining agreement constituted such "rules and regulations." Accordingly, it concluded that appellant's contract had not been impaired when the Board held him subject to the service fee provision.

ARGUMENT

I. This Court's Decision in *Abood v. Detroit Board of Education* is Dispositive of the Facial Constitutionality of the Service Fee Provision in Question [3]

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court held that a service fee [*i.e.*, an agency shop] provision in a collective bargaining agreement between the Detroit Board of Education and the Detroit Federation of Teachers, as the exclusive representative for that City's teachers, was on its face constitutional. The service fee in that case had been agreed to pursuant to a Michigan statute that expressly authorizes a public employer and a union, if they wish, to include such a provision in their collective bargaining agreement. Mich. Comp. Laws § 432.210(1)(c). The instant case likewise involves a constitutional challenge to the facial validity of a service fee provision in a collective bargaining agreement between a public school district and the union recognized as the exclusive representative of its teachers. It differs from *Abood* in that Ohio, unlike Michigan, does not have a statute that *expressly* authorizes a public employer and a union to include such a provision in their

---

[3] By "facial constitutionality" we refer to this Court's conclusion in *Abood* that "an agency shop provision in a collective bargaining agreement covering governmental employees is, *as such*, constitutionally valid . . . ." 431 U.S. 209, 217 (1977) (emphasis added.) The instant appeal does not raise any question as to the specific union activities for which the service fee may be expended over objection, *id.* at 232-237, the appropriate remedy available to objecting service fee payers, *id.* at 237-241, or other subsidiary matters addressed in *Abood*.

collective bargaining agreement. The service fee provision in question was agreed to pursuant to state statutes of a more general nature that have been construed by the Ohio Supreme Court as providing the necessary authorization. Focusing upon this difference, appellant contends that *Abood* has application only when there is *express* statutory authorization for a service fee provision and that the instant case, therefore, presents a substantial federal question left unanswered by that decision.

The fulcrum for this Court's decision in *Abood* is a deference to the state's policy judgment that it would promote labor peace to permit a public employer and a union to enter into an agreement requiring employees who obtain the benefits of union representation to share the cost. As we demonstrate below, there is nothing in the *Abood* decision itself or in any other decision of this Court to suggest that the state's policy judgment is entitled to any less deference if it is reflected in an action taken by an organ of state government other than the legislature (Section A) or a judicial construction of more general state statutes that are not explicit on the point (Section B).

A. Authorization by the state legislature is not a *sine qua non* for the facial constitutionality of a service fee provision in a public sector collective bargaining agreement

Appellant begins his argument by asserting that:

> In the Absence of a Statute Authorizing Compulsory Unionism Public Employees Have a Constitutional Right to Refrain From Providing Financial Support To A Union.

Juris. Stat. at 11.

In support of this assertion, he points out that this Court in *Abood* noted that "Michigan has enacted legislation authorizing . . ." a service fee provision and referred specifically to the "legislative judgment" reflected in that

statute. *See, e.g.*, 431 U.S. at 223-24; Juris. Stat. at 13-14.[4]

---

[4] Based upon these comments, appellant appears to be arguing that a service fee provision will pass constitutional muster only if it is authorized by a state statute, and this is the argument to which we respond in text. Certain of appellant's other comments indicate, however, that this may not accurately reflect his position.

Appellant concludes his analysis of *Abood* with the statement that "[u]nless and until the Ohio Legislature says he is *required* to provide financial support to his union representative, he is free—that is, he has the right—to withhold such support." Juris. Stat. at 15 (emphasis added). If appellant is suggesting that a *mandate* by the state legislature is a prerequisite to constitutionality, he urges a position that is inconsistent with *Abood*. In *Abood* this court was not dealing with a situation in which the Michigan Legislature had said that a non-member was required to provide financial support to the union. The assessment of the Michigan legislature merely was that such a requirement might under appropriate circumstances contribute to labor peace, but it left to individual public employers the decision as to when those circumstances existed. Accordingly, it was the Detroit Board of Education that *required* non-members of the Detroit Federation of Teachers "to provide financial support" to the union when it agreed to include a service fee provision in the collective bargaining agreement.

Nor is it entirely clear that appellant views any action by the *state legislature itself* as essential. Thus, in order to illustrate the type of "legislative judgment" pursuant to which an "invasion [of First Amendment rights] is constitutionally justified . . .", Juris. Stat. at 14, appellant cites *Breard v. Alexandria*, 341 U.S. 622 (1951), which involved a *local ordinance* enacted by a *city council*. This suggests that the critical distinction for appellant may not be between the state legislature and local legislative bodies, such as school boards, but rather between the legislative and other branches of state government (*i.e.*, the executive and judicial branches). But this distinction does not entirely square with the importance that appellant attaches to the fact that the Governor of Ohio on two occasions vetoed public employee collective bargaining statutes that, among other things, expresaly authorized a service fee provision. Juris. Stat. at 15-17. It is not necessary for present purposes to determine precisely which of these theories appellant is pursuing, since, as we demonstrate in the text, his argument fails in either event.

But these statements by this Court hardly can be taken to mean that the existence of the Michigan statute was essential to the decision: inasmuch as *Abood* involved a state statute, it is difficult to see how the case could have been decided without discussing it. There is nothing in the Court's analysis, however, to suggest that the First Amendment principles which were set forth turn upon whether the state chooses this or some other means to express its policy judgment *vis-a-vis* the contribution that a service fee provision can make to labor peace. Indeed, this Court explicitly has rejected the notion that the outcome in cases such as this—*i.e.*, in which the issue is whether state action impacting on First Amendment rights is justified by the governmental interests involved—depends on whether the balance is made by the state legislature, as opposed to some other organ of state government. Thus, in *Hughes v. Superior Court*, 339 U.S. 460 (1950), plaintiff based his First Amendment challenge on the fact that the policy prohibiting certain picketing had been fashioned by a state court rather than by the state legislature. This Court summarily disposed of this argument, declaring:

> The fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial [citing cases]. For the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches [citing cases]. '[*R*]*ights under that amendment turn on the power of the State, no matter by what organ it acts.*'

Id. at 466-467. (Emphasis added.)

Consistent with the above, this Court on numerous occasions has upheld actions taken by local school boards and other municipal agencies despite their impact on First Amendment rights when those agencies had deter-

mined that the governmental interests sought to be furthered were of suitable importance and were properly advanced by the actions in question.[5] In none of these cases did this Court inquire into whether the state legislature had authorized or endorsed the action in question, nor did it ever suggest that such an inquiry was in any way relevant to the outcome. To the contrary, this Court consistently has accorded to these local policy judgments the same presumption of validity that attaches to the judgments of the state legislature.[6]

---

[5] *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 114, 121 (1972) ("The Rockford City Council has made the basic policy choices . . . . Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-17 (1976) (dictum) (noting constitutional authority of municipality to regulate soliciting and canvassing); *Breard v. City of Alexandria, supra*, 341 U.S. at 640-41, 644-45 (sustaining municipal anti-solicitation ordinance); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (ban on political advertisements on public rapid transit system justified as reflecting "reasonable legislative objectives advanced by the city in a proprietary capacity"). *Cf. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (sustaining village zoning ordinance prohibiting more than two unrelated individuals from residing together); *Young v. American Mini Theatres, Inc.*, 427 U.S. 40 (1976) (sustaining city zoning ordinance limiting the showing of adult films); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 650 (1974) (sustaining rule of School *Board of Chesterfield County, Virginia*, regarding reemployment of teachers following childbirth).

[6] *See, Harrah Independent School District v. Martin*, 440 U.S. 194, 198 (1979); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). *Cf. also Village of Belle Terre, supra*, 416 U.S. at 1 (describing zoning ordinance adopted by village of 700 people as a "line drawn by a legislature"); *Lehman v. City of Shaker Heights, supra*, 418 U.S. at 304 (discussing city's "reasonable legislative objectives").

B. Assuming, *arguendo*, that a service fee provision in a public sector collective bargaining agreement is unconstitutional unless it is authorized by the state legislature, the necessary authorization exists here

In asserting that "The State Of Ohio Has Not Enacted Legislation Authorizing Agency Shop [*i.e.*, service fee] Agreements," Juris. Stat. at 15, appellant simply ignores the decision of the Supreme Court of Ohio: that Court held that the Ohio statutes *do* authorize a school board to include a service fee provision in its collective bargaining agreement with the union, albeit not explicitly.

Appellant concedes—as he must—that the decision of the Ohio Supreme Court is grounded on a construction of Ohio statutes governing the powers and responsibilities of local boards of education. He contends, however, that the Court misconstrued these statutes in holding that they authorize the Board to agree to the challenged service fee provision.[7] Even if accepted canons of statutory construction supported appellant in this regard (which in fact they do not), it would not give rise to a federal question appropriate for review by this Court. The decision of the Ohio Supreme Court is conclusive as to whether the Board's action was authorized by state law. See, *Reinman v. Little Rock*, 237 U.S. 171, 176, (1915) ("The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock"). And see generally *Abood*, *supra*, 431 U.S. at 232-233 ("[T]he state court's construction of the Michigan statute is authoritative

[7] Specifically, appellant contends that the state statutes which the Ohio Supreme Court construed as authorizing the challenged provision "originated in antiquity . . ." (Juris. Stat. at 21) "long before there was any thought of agency shops" (*id.* at 18); and appellant asserts that by construing those statutes to authorize a service fee provision the Court improperly engaged in "a legislative function" and arrived at "an overbroad and unwarranted interpretation of an otherwise valid enactment . . . ." (*id.* at 20-21).

. . . .") ; *Missouri ex rel. Hill v. Dockery*, 191 U.S. 165, 171 (1903) *Murdock v. City of Memphis*, 20 Wall. 590 (1875).[8]

Accordingly, even if appellant was correct in asserting that a service fee provision in a public sector collective bargaining contract is facially constitutional only when authorized by the state legislature, the necessary authorization exists here: as authoritatively construed by Ohio's court of last resort, the state statutes authorize the

---

[8] In criticizing the Ohio Supreme Court's construction of Ohio law, appellant notes that in 1975 and 1977 the Governor vetoed bills passed by the state legislature which would expressly have authorized service fee provisions. Juris. Stat. at 15-19. (The bills in question also would have authorized public employee strikes and compulsory arbitration, to which the Governor likewise objected. App. 30a-41a.) Although appellant suggests that those legislative developments argue against construing Ohio law as authorizing the challenged provision, the fact remains that it is for the Ohio Supreme Court, not this Court, to construe Ohio law. If the issue were open, however, we simply would note that even had the Ohio legislature *rejected* (and not merely failed to override the vetoes of) the bills in question, such action would not be tantamount to a legislative decision to preclude service fee provisions, nor would it settle the meaning of existing Ohio statutes that bear on that subject. *Cf. Girouard v. United States*, 328 U.S. 61, 69-70 (1946); *Jackson Transit Authority v. Amalgamated Transit Union*, —— U.S. ——, 50 U.S.L.W. 4603, 4605 n. 8 (U.S. June 7, 1982).

City of Madison, etc. v. Wisc. Emp. Rel. Comm'n, 429 U.S. 167 (1976), which appellant cites on page 21 of his Juris. Stat., provides no support for his position. In *City of Madison* the issue was not so much whether the Wisconsin Supreme Court properly had construed the state statute in question, but whether that construction (which this Court indicated "standing alone, would not ordinarily be open to our review . . .", *id.* at 174, n. 5) violated the constitutional rights of plaintiffs.

In this connection, appellant's complaint that the Ohio Supreme Court acted "legislatively" in this case, even if well-taken, would not give rise to a federal question. "It of course rests with each state to determine in what form and by what agencies its legislative power may be exerted." *King Mfg. Co. v. Augusta*, 277 U.S. 100, 103 (1928).

Board to agree to the challenged provision. All that remains, then, of appellant's attempt to distinguish the instant case from *Abood* is the fact that the statutory authority in Michigan is *expressly* set forth, whereas in Ohio it is derived from statutes of a more general nature. It is frivolous even to suggest that this provides a sufficient basis for distinctions in First Amendment rights.

In sum, this case falls squarely within the ambit of *Abood*, and the appeal does not present a substantial federal question for review by this Court.

II. Inasmuch as appellant's individual employment contract was not impaired, this appeal does not present any question under the Contract Clause

Appellant contends that in holding him subject to the service fee provision in the collective bargaining agreement, the Board "altered the terms of its prior contract with [him] to his detriment," and that "a classic case of the constitutional impairment of a contract is presented by these facts." Juris. Stat. at 22. This contention fails at the threshold: since the service fee provision was incorporated into appellant's individual employment contract, there was no impairment of that contract.

Appellant's individual employment contract expressly obligated him "to abide by and maintain the rules and regulations adopted by" the Board. The provisions in the collective bargaining agreement between the Board and appellee, including the service fee provision, constitute "rules and regulations adopted by" the Board. *See Abood*, *supra*, 431 U.S. at 253 (Powell, J., concurring in judgment); *id.* at 228-229 (Opinion of the Court); *Dayton Teachers Assn. v. Dayton Board of Education*, 41 Ohio St. 2d, 127, 134 (1975).

Moreover, even if appellant's contract did not by its terms incorporate the provisions in the collective bargaining agreement, this would in any event be the result as

a matter of Ohio law. In *Rehor v. Case Western Reserve University, supra*, the Ohio Supreme Court held that when a university faculty member enters into a standard-form individual employment contract which does not set forth the relevant conditions of his employment, the university's rules and regulations, even if adopted after the execution of that contract, are incorporated into it. As the Ohio Supreme Court concluded here, "[i]n light of *Rehor* . . .", appellant's individual employment contract did not "exempt [him] from the terms of the [collective bargaining] agreement." App. 4a.

And, finally, appellant testified at trial that he was aware when he entered into his individual employment contract that any agreement reached by the Board and appellee in the then ongoing collective bargaining would apply to him. See p. 2, n. 2, *supra*. Indeed, appellant hardly could have claimed otherwise since (A) the standard-form individual employment contract did not set forth any terms of his employment other than that he would teach for a year at a specified salary and "abide by and maintain the rules and regulations adopted by [the] Board for the government of [the] schools . . . ."; (B) as the Superintendent of Schools explained, the practice in the Jefferson Area School District (where appellant had taught for several years) was for the Board to enter into a bare-bones employment contract with each teacher while collective bargaining was ongoing, with the understanding that the subsequently executed collective bargaining contract would "become a part of the individual employment agreements . . . .", see p. 3, n. 2, *supra*; and (C) during the 1978-79 school year, appellant accepted without objection the salary provided for in the collective bargaining agreement, despite the fact that it was higher than that called for in his individual employment contract, and the increased fringe benefits.

There is no need to belabor the point. Since the Ohio Supreme Court concluded that the provisions of the col-

lective bargaining agreement, including the challenged service fee provision, were incorporated into appellant's individual employment contract,[9] his contract was not impaired. Article I, Section 10, of the Constitution does not even come into play.[10]

---

[9] The state court's finding as to the nature of appellant's contractual expectations, while not conclusive in this Court, are entitled to great weight and should be accepted "unless manifestly wrong." *Hale v. State Board*, 302 U.S. 95, 101 (1937); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938). As demonstrated in the text, the Ohio Supreme Court's findings were manifestly *right*.

[10] Since, as established in the text, this appeal does not involve any alteration of appellant's contract, the questions of whether and under what circumstances the governmental interests advanced by a service fee provision would justify the impairment of a teacher's individual employment contract are not presented for decision here.

It is appropriate to point out, however, that even if the application of the service fee provision to appellant *was* contrary to the terms of his individual employment contract, this only would indicate the *potential* applicability of the Contract Clause; it would not establish a violation of the Clause. Not every breach of contract by a state violates the Contract Clause. To make out a violation, it first would be necessary to conclude that the required $83.13 service fee not only breached appellant's contract, but "impair[ed] the obligation" of that contract. (In this connection, appellee emphasized in the state courts "that no risk exists to [appellant's] employment [and] that what is sought here is simply the enforcement of a contractual obligation by an action for damages." Statement of Proceedings at 25.) Even if an impairment were deemed to exist, the Board's action still would pass muster under the Contract Clause, given the modest nature of the "impairment," together with the fact that the Board's action was "reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). *See also Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978); *El Paso v. Simmons*, 379 U.S. 497 (1965). In this regard, the important governmental interests served by public-sector service fee provisions were made clear in *Abood*. *See* 431 U.S. at 217-223, 224-225, 229. And more generally, a school board properly may conclude that the public interest requires that "[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, . . .

CONCLUSION

For the reasons set forth above, this Court should dismiss the appeal for want of a substantial federal question, or, in the alternative, affirm the decision of the Ohio Supreme Court.

Respectfully submitted,

DENNIS HAINES
BARRY LAINE
GREEN, SCHIABONI, MURPHY, HAINES & SGAMPATTICO, L.P.A.
P.O. Box 849
4th Floor
Dollar Bank Building
Youngstown, Ohio 44501
(210) 743-5101

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Appellee

---

not . . . be used to forestall bargaining or to limit or condition the terms of the collective agreement." *See, J. I. Case Co. v. Labor Board*, 321 U.S. 332, 337 (1944).

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID LOCKWOOD, *Appellant,*

v.

JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO

OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM JUDGMENT BELOW

DAVID T. BRYANT
National Right To Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel For The Appellant

Of Counsel:

REX H. REED
National Right To Work Legal Defense Foundation, Inc.

JAY TIMS
Harrington, Huxley & Smith
1200 Mahoning Bank Building
Youngstown, Ohio 44503

PANNON PRINTING CENTER, ALEXANDRIA, VIRGINIA 22301 (703) 683-3400

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SINCE COLLECTIVE BARGAINING IS NOT REQUIRED BY OHIO LAW, THIS CASE IS NOT CONTROLLED BY *ABOOD* v. *DETROIT BOARD OF EDUCATION* 1

CONCLUSION 7

APPENDIX

Order of the U.S. District Court for the Northern District of Indiana in *Perry* v. *City of Fort Wayne* 1a

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 1, 4, 7

Dayton Teachers Association v. Dayton Board of Education, 41 Ohio St.2d 127, 323 N.W.2d 714 (1975) . 1, 5

Elrod v. Burns, 427 U.S. 347 (1976) 5, 7

Galda v. Bloustein, No. 81-2433 (3d Cir. August 4, 1982) 6

Gary Teachers v. School City of Gary, 284 N.E.2d 108 (Ind. App. 1972) 5

Indiana Education Employment Relations Board v. Benton Community Schools Corporation, 365 N.E. 2d 752 (Ind. Sup. Ct. 1977) 5

Mt. Heathy City School Dist. v. Doyle, 429 U.S. 274, 280 (1977) 4

Perry v. City of Fort Wayne, Civil No. F 82-48 (N.D. Ind. 1982) 5, 6

Railway Employees' Department v. Hanson, 351 U.S. 225 (1956) 2, 3, 4

Constitutional Provisions

Constitution of the United States

First Amendment 2, 4, 5, 6

Fourteenth Amendment 2

Constitution of Ohio

Article II, Section 1 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2236

DAVID LOCKWOOD, *Appellant*,

v.

JEFFERSON AREA TEACHERS ASSOCIATION, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF OHIO

OPPOSITION TO MOTION TO DISMISS OR TO AFFIRM JUDGMENT BELOW

SINCE COLLECTIVE BARGAINING IS NOT REQUIRED BY OHIO LAW, THIS CASE IS NOT CONTROLLED BY *ABOOD* v. *DETROIT BOARD OF EDUCATION*

In this case, there is one critical fact that distinguishes it from the case of *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). That fact is that in Ohio collective bargaining by public employers is not required by law; it is discretionary. *Dayton Teachers Association* v. *Dayton Board of Education*, 41 Ohio St.2d 127, 323 N.E.2d 714 (1975). Since bargaining is not required, there has been no legislative policy decision made that collective bargaining furthers impor-

tant state interests. If that decision has not been made, there can be no contribution made by an agency shop provision to a policy that does not exist and the First and Fourteenth Amendment rights of Mr. Lockwood are paramount in this situation.

The problems created by compulsory unionism agreements in both the public and private sectors have been before the Court on several occasions. In approving the Railway Labor Act's authorization for such agreements in *Railway Employees' Department* v. *Hanson*, 351 U.S. 225, 233-34 (1956), the Court said:

> In the absence of conflicting federal legislation, there can be no doubt that it is within the police power of a State to prohibit the union or the closed shop. We so held in Lincoln Federal Labor Union No. 19129, A. F. of L. v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212, and in American Federation of Labor v. American Sash & Door Co., 335 U.S. 538, 69 S.Ct. 258, 93 L.Ed. 222, against the challenge that local "right to work" laws, including Nebraska's, violated the requirements of due process. But the power of Congress to regulate labor relations in interstate industries is likewise well-established. Congress has authority to adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." Texas & N.O.R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U.S. 548, 570, 50 S.Ct. 427, 433, 74 L.Ed. 1034. These measures include provisions that will encourage the settlement of disputes "by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them", Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 548, 57 S.Ct. 592, 600, 81 L.Ed. 789, and

that will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 57 S.Ct. 615, 622, 81 L.Ed. 893. Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained.

The choice by the Congress of the union shop as a stabilizing force seems to us to be an allowable one. Much might be said *pro* and *con* if the policy issue were before us. Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. Mr. Justice Brandeis, who had wide experience in labor-management relations prior to his appointment to the Court, wrote forcefully against the closed shop. He feared that the closed shop would swing the pendulum in the opposite extreme and substitute "tyranny of the employee" for "tyranny of the employer." But the question is one of policy with which the judiciary has no concern, as Mr. Justice Brandeis would have been the first to concede. Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary. (351 U.S. at 233-34, footnotes omitted.)

More recently the Court, in *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), in approving a limited form of agency shop provision pursuant to a Michigan statute which requires mandatory bargaining and authorizes the parties to agree to compulsory unionism provisions, said:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. (431 U.S. at 222.)

The appellee union argues that *Abood* is dispositive of this case because the Ohio Supreme Court, as one of the policy making bodies of Ohio, has approved the agency shop provision here involved. That argument is fatally defective for at least two reasons.

First, in *Hanson* and *Abood* it was a *legislative* judgment that was approved. Those cases also make it clear that the judgment is one for the legislature to make, *not* the judiciary or some subordinate political subdivision. In Ohio, school districts are not a part of the "State." *Mt. Heathy City School Dist.* v. *Doyle,* 429 U.S. 274, 280 (1977). Indeed, in Ohio, all legislative power is reserved to the legislature by Article II, Section 1, of the Constitution of Ohio.

Second, *Hanson* and *Abood* actually require two policy decisions by the legislature before First Amendment freedoms may be curtailed and one of the required decisions has *not* been made in this case. The first decision a legislature has to make is that a *manda-*

tory system of bargaining is required and that decision simply has *not* been made in this case. The Ohio Supreme Court's decision in the *Dayton Teachers Association* case makes it clear that public sector bargaining in Ohio is discretionary, *not* mandatory. Under these circumstances the state action must survive exacting scrutiny and further some vital government end by a means that is least restrictive of First Amendment freedoms. *Elrod* v. *Burns*, 427 U.S. 347, 362-64 (1976).

The issue here involved was recently presented to the U.S. District Court for the Northern District of Indiana in *Perry* v. *City of Fort Wayne*, Civil No. F 82-48, May 14, 1982, a copy of which is included in the Appendix to this opposition. The facts in that case are strikingly similar to those involved here. Indiana has no statute which governs labor relations between cities and their employees. *Indiana Education Employment Relations Board* v. *Benton Community Schools Corporation*, 365 N.E.2d 752 (Ind. Sup. Ct. 1977). However, collective bargaining is discretionary. *Cf., Gary Teachers* v. *School City of Gary*, 284 N.E.2d 108 (Ind. App. 1972). Nevertheless, the City of Fort Wayne entered into a collective bargaining agreement with a representative of its employees which made payment of an agency fee by nonmembers a condition of employment. Ms. Perry refused to pay the fee and was discharged. In granting her preliminary injunction and ordering the city to reinstate her the court said:

> In the absence of any statute authorizing agency shop agreements, defendants have been able to cite only Fort Wayne's practice of entering into such agreements as proof of a state determination that they play an important part in the state's system of labor relations. The Supreme Court in *Abood*, however, clearly contemplated something more

than the agreement itself, to justify the infringement on First Amendment rights caused by it. In order to put some legislative weight behind these contracts, defendants argue that by virtue of the Indiana Home Rule Statute, I.C. 36-1-3-1 through 36-1-3-9, these agency shop agreements were authorized by state law and embody a determination that such agreements are important to Indiana's system of labor relations. The Supreme Court recently rejected a similar argument in *Community Communications Co., Inc.* v. *City of Boulder,* 50 U.S.L.W. 4144 (U.S. Jan. 13, 1982). In *City of Boulder,* the Court found that a municipality's action undertaken pursuant to its "Home Rule" authority is not action contemplated by the state and not an affirmative expression of state policy. Thus, it appears unlikely that defendants will be able to show a strong governmental interest to offset the infringement of First Amendment rights caused by the agency shop agreement.

On the basis of the evidence now before the Court, it appears likely that plaintiff will be able to show that the agency shop provision here infringes on her First Amendment rights, and it also appears unlikely that defendants will be able to show a sufficiently strong governmental interest to justify this infringement. The Court finds, therefore, that plaintiff has at least a reasonable likelihood of success on the merits. (Footnote omitted, 10a.)

This reasoning is persuasive and it should be followed by this Court. *See also, Galda* v. *Bloustein,* No. 81-2433 (3d Cir. Aug. 4, 1982).

Since collective bargaining by public employers is not even required in Ohio, the agency shop here involved cannot survive either exacting scrutiny or the least restrictive alternative test.

CONCLUSION

For the reasons stated this Court should note probable jurisdiction. In the alternative, citing *Abood* and *Elrod* v. *Burns*, this Court should summarily reverse and remand the case with instructions to enter judgment for Mr. Lockwood.

Respectfully submitted,

DAVID T. BRYANT
National Right To Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Counsel For The Appellant

Of Counsel:

REX H. REED
National Right To Work Legal
Defense Foundation, Inc.

JAY TIMS
Harrington, Huxley & Smith
1200 Mahoning Bank Building
Youngstown, Ohio 44503

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Civil No. F 82-48

ELIZABETH PERRY, *Plaintiff*,

v.

CITY OF FORT WAYNE and LOCAL LODGE 2569 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *Defendants*.

ORDER

This matter is before the Court on plaintiff's February 25, 1982 Motion for Preliminary Injunction.

The Court held a hearing on this motion on March 15, 1982 at which the Court received testimony and heard arguments. The relevant facts as revealed by the record and adduced in this hearing are as follows. Plaintiff is an employee of defendant City of Fort Wayne and has been employed since March 26, 1980 as a Comprehensive Employment Training Act (CETA) staff service clerk. In this position plaintiff is subject to the provisions of the Collective Bargaining Agreement between the union and the City of Fort Wayne. Under Article V of the Agreement all employees represented by the union, even if they elect not to become union members, must pay to the union, as a condition of employment, an "agency fee" equal in amount to union dues. (Plaintiff's Exhibits 18 and 19).

Plaintiff did not immediately comply with this requirement and the union did not immediately enforce it. Rather, sometime in December 1980 or February 1981 plaintiff was contacted by the union and told that she had to pay her

dues.[1] On February 26, 1981 plaintiff submitted a check to the union in payment of her initiation fee and her first month's dues. Her check was accompanied by a letter protesting the requirement that she pay any dues at all and specifically protesting the payment of any fees over the amount germane to collective bargaining. Plaintiff stated that she would not submit any further payments until she received a rebate for the amount not germane to collective bargaining purposes and verifiable evidence indicating an appropriate method to make this determination. (Plaintiff's Exhibit 4).

In response to this demand, the union sent her a copy of its "Circular 669" which describes union policy regarding refunds for those who object to the use of their fees for political purposes. Under the union procedure, at the close of each year a committee determines the percentage of the dues from that year which were used for political purposes. The union then uses this percentage to calculate the amount any objector had paid for political purposes, and this amount is deducted from his dues in the following year. (*See,* testimony of Frederick E. Roberts and plaintiff's Exhibit 7). Other than the unembellished copy of Circular 669, the union made no attempt to explain this procedure to plaintiff.

Plaintiff paid dues for three more months under continual protest, but after June 1981 she refused to pay monthly dues because she was not sure that she was going to get the rebate she demanded. (Transcript of Hearing, p. 87). She continued to refuse to pay the required fees even though she was aware that failure to make these payments would

---

[1] The testimony on this point was in conflict. Ms. Perry testified that she was first contacted by the union in February 1981. Mr. Knappenberger testified that he contacted plaintiff about paying her dues just after Christmas of 1980. The union's steward at plaintiff's office, Mr. Bumgardner, testified that he first contacted her in December, 1980.

be cause for termination. (Transcript of Hearing, pp. 95-96). On February 22, 1982, plaintiff was terminated for failure to pay union dues or an agency fee. (Plaintiff's Exhibit 13).

Three days later, on February 25, 1982, plaintiff filed suit in this Court and sought a temporary restraining order to restrain defendants from conditioning her employment on full payment of union dues or an equivalent agency fee. This Court granted the motion and ordered defendant City of Fort Wayne to reinstate plaintiff to her former employment. The temporary restraining order expired March 15, 1982 but at the conclusion of the March 15, 1982 hearing the parties stipulated to a thirty (30) day extension of the restraining order contingent upon plaintiff tendering security to defendant union in the amount of Thirteen Dollars ($13.00). On April 15, 1982 the parties again stipulated to a thirty (30) day extension of the restraining order contingent upon the same conditions. Plaintiff now seeks a preliminary injunction compelling defendant City of Fort Wayne to reinstate plaintiff to her former employment pending a final determination on the merits.

A preliminary injunction is an extraordinary remedy which is not available unless the plaintiff carries the burden of persuasion as to the following prerequisites:

1. That the plaintiff has no adequate remedy at law and will be irreparably harmed if the injunction does not issue;

2. That the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendants;

3. That plaintiff has at least a reasonable likelihood of success on the merits; and

4. That the granting of a preliminary injunction will not disserve the public interest.

Fox Valley Harvestore v. A. O. Smith Harvestore Products, Inc., 545 F.2d 1096, 1097 (7th Cir. 1976).

Because the critical consideration here is whether plaintiff has shown a reasonable likelihood of success on the merits, the Court will begin its analysis with that issue.

I. Likelihood of Success on the Merits.

Plaintiff's action is brought under 42 U.S.C. § 1983 and alleges violations of plaintiff's rights under the First and Fourteenth Amendments. The Court has jurisdiction over this cause under 28 U.S.C. § 1343(3). Plaintiff presents a two pronged attack on the agency shop arrangement to which she is subject as a city employee. First, plaintiff argues that the agency shop agreement is unconstitutional on its face and that she cannot be required to pay an agency fee to the union as a condition of employment with the city. Second, even if the agency fee requirement is found to be valid, plaintiff argues that she cannot be required to pay any amount over and above the amount germane to collective bargaining purposes.[2]

Plaintiff relies on the Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1792 (1977), to show that her First Amendment rights are infringed by the agency shop arrangement here.[3] In *Abood*,

---

[2] In her complaint, plaintiff appears to raise only this second issue. However, in oral argument at the March 15, 1982 hearing it became clear that plaintiff also seeks relief on the basis of the first argument. Defendant argued this issue in his brief in opposition to plaintiff's motion for preliminary injunction and in oral argument at the March 15, 1982 hearing. Since this issue has been litigated by the implied consent of the parties it will be treated as if it had been raised in the pleadings. Rule 15(b), FED. R. CIV. P.

[3] The Supreme Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714 (1956) and *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), provide background for the Court's decision in *Abood v. Detroit Bd. of Educ.*, 433 U.S. 915, 97 S.Ct. 2989 (1977), but are not directly applicable here. In

public school teachers brought suit challenging the validity of an agency shop clause in the agreement between the Detroit Board of Education and their union. The terms of the agency shop were precisely the same as those presented here—plaintiffs, even though not members of the union, were required to pay to the union, as a condition of employment, a service fee equal in amount to union dues. *Id.* at 1787. In Mr. Justice Stewart's plurality opinion, the Court stated:

> "To compel employees financially to support their collective-bargaining representatives has an impact upon their First Amendment interests." *Id.* at 1793.

Justice Powell wrote in his concurring opinion:

> Certainly, if individual teachers are ideologically opposed to public sector unionism itself, as are the appellants in this case, one would think that compelling them to affiliate with the union by contributing to it infringes their First Amendment rights to the same degree as compelling them to contribute to a political party. *Id.* at 1811.

Hanson, plaintiffs objected to a union shop agreement where railroad workers had to become members of the union, not merely pay an equivalent fee, as a condition of employment. In *Street*, plaintiffs objected to the same union shop arrangement because the required fees were used to finance the campaigns of candidates whom they opposed, and to promote economic and political ideologies with which they disagreed. In this first argument, plaintiff is not contesting the uses to which her fees were put. Furthermore, in both cases the Court was asked to interpret a specific section of the Railway Labor Act, Section 2, Eleventh, which permitted voluntary union-shop agreements in the private sector. Justice Powell's concurring opinion in *Abood* concluded, after a lengthy discussion of these cases, that the only clear holding of these cases is that Section 2, Eleventh, does not of itself violate the First Amendment. *Abood*, 97 S.Ct. at 1807.

Defendants first contend that plaintiff has not shown that the operation of this agency shop agreement has infringed any of her First Amendment interests. They characterized this matter as purely a "pocketbook" dispute, not a dispute of constitutional dimensions. Plaintiff stated her position with respect to the payment of fees to the union in several letters of protest to union officials. In her letters of March 17, 1981 to Mr. Roberts (plaintiff's Exhibit 6) and to Mr. Huntine (plaintiff's Exhibit 27), and in her general letter of protest to the union (plaintiff's Exhibit 4), plaintiff clearly stated her position that she should not be required to pay the union any fee at all. In her April 9, 1981 letters to Mr. Eugene Glover (plaintiff's Exhibit 8) and to Mr. Roberts (plaintiff's Exhibit 9), plaintiff stated that she objected to the payment of any fees to the union because Indiana law prohibits agency shops for city or government employees.

Defendants, on the other hand, presented evidence tending to show that her refusal to pay any agency fees was based on economic considerations.[4] Yet, even if the Court were to find from this evidence that plaintiff did in fact have economic reasons for refusing to pay, it could not

---

[4] Mr. Richard Knappenberger, the Secretary Treasurer for the union at the time of the subject events, called plaintiff in December of 1981 to tell her that she was six months behind on her dues and that if she didn't get caught up she would lose her job. He testified that she did not make any protest about the requirement of agency fees, but rather only complained that she did not have the money. (Transcript of Hearing, p. 228). When asked about this conversation on cross-examination, plaintiff said that she could not recall making this statement, but she did say that she thought $13 per month for union dues was too much. (Transcript of Hearing, p. 83.) Furthermore, in payment of her initiation fees and initial dues plaintiff submitted two checks which were returned for insufficient funds. It was not until November 5, 1981, over eight months after plaintiff submitted the first check, that the union was paid this fee.

find on the basis of all the evidence presented at this time that the economic reason was the only reason. Plaintiff's persistent letters protesting the payment of union fees and the use of her fees for political purposes show that she had her First Amendment rights in mind when she refused to pay. Although plaintiff's First Amendment interests in refusing to pay any fee at all might not have been developed to the degree that this Court would prefer, plaintiff has at least shown a high probability that she will be able to prove that the agency shop requirement of fees infringes on her First Amendment interests.

In *Abood*, after finding that the agency shop agreement on its face infringed upon First Amendment rights, the Court went on to consider the governmental interests that might be balanced against the First Amendment interests. The Court noted that in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714 (1956) and *Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), the Court had already balanced the governmental interests against the First Amendment interests in the context of a union shop agreement authorized by the Railway Labor Act and found that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[8] *Abood*, 431 U.S. at 222, 97 S.Ct. at 1793. In *Hanson* and *Street* the Court found this legislative assessment in the system of labor relations established by the Railway Labor Act. In *Abood*, as here, the assessment of

---

[8] Although it may not be clear that *Hanson* and *Street* found First Amendment interests implicated by the forced contributions to the union under the union shop agreement at issue in those cases, *see* concurring opinion of Justice Powell in *Abood*, 431 U.S. at 244-264, 97 S.Ct. at 1804-1813, it is clear that the Court in those opinions relied on the legislative determination that the authorization of such agreements was important to its system of labor relations.

governmental interest cannot come from the federal system of labor relations because, under the National Labor Relations Act, the labor relations of state and local governments are left to the states. 29 U.S.C. § 152(2). The *Abood* Court found, however, that Michigan had established a system of labor relations for local government units modeled after federal law. Under the Michigan law the employees of local government units were given the right to organize and bargain collectively. A union supported by the majority of the employees in a given bargaining unit became the exclusive representative of those employees and was under the concomitant duty to fairly represent all employees in the unit, whether union members or not. In order to ensure that all the employees represented by the union fairly shared the financial burden of the union's duties as exclusive bargaining agent, the Michigan law authorized the agency shop clause at issue there.

In finding the agency shop agreement valid, the Court stated:

> Our province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment. Rather, it is to adjudicate the constitutionality of that decision. The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us. *Abood*, 431 U.S. at 224-226, 97 S.Ct. at 1794.

The Court further clarified its basis for upholding the agency shop agreement in the following passage:

> [A]lthough Michigan has not adopted the federal model of labor relations in every respect, it has determined that labor stability will be served by a system of exclusive representation and the permissive use of an agency shop in public employment. As already stated, there can be no principled basis for according that decision less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act. *Abood*, 431 U.S. at 229, 97 S.Ct. at 1796.

The above review of *Abood* shows that the Court permitted the infringement on First Amendment rights caused by the agency shop agreement because the Michigan legislature had determined that such agreements further the state's strong and legitimate interest in promoting just and peaceful labor relations. Without some such determination reflecting strong countervailing government interests, the agency shop agreement at issue there would not have survived constitutional scrutiny. If defendants cannot show that the State of Indiana has made a similar determination, the agency shop agreement here must fall.

In enacting Public Law 254, Acts of 1975 (codified at I.C. 22-6-4-1, *et seq.*), the Indiana legislature established a system for the regulation of labor relations between public employees and their governmental employers. Although it is not clear whether this law authorized agency shop agreements, it was derived in large part from the National Labor Relations Act and contained the familiar provisions of collective bargaining and exclusive representation. In 1977, however, the Indiana Supreme Court declared this law unconstitutional as violative of the Indiana Constitution. *Indiana Education Employment Relations Board v. Benton Community Schools Corporation*, 365 N.E.2d 752 (Ind.Sup. Ct. 1977). Defendants have not alleged that any new law has been enacted to replace Public Law 254, and the Court has found none.

In the absence of any statute authorizing agency shop agreements, defendants have been able to cite only Fort Wayne's practice of entering into such agreements as proof of a state's determination that they play an important part in the state's system of labor relations. The Supreme Court in *Abood*, however, clearly contemplated something more than the agreement itself, to justify the infringement on First Amendment rights caused by it. In order to put some legislative weight behind these contracts, defendants argue that by virtue of the Indiana Home Rule Statute, I.C. 36-1-3-1 through 36-1-3-9, these agency shop agreements were authorized by state law and embody a determination that such agreements are important to Indiana's system of labor relations. The Supreme Court recently rejected a similar argument in *Community Communications Co., Inc. v. City of Boulder*, 50 U.S.L.W. 4144 (U.S. Jan. 13, 1982). In *City of Boulder*, the Court found that a municipality's action undertaken pursuant to its "Home Rule" authority is not action contemplated by the state and not an affirmative expression of state policy. Thus, it appears unlikely that defendants will be able to show a strong governmental interest to offset the infringement of First Amendment rights caused by the agency shop agreement.

On the basis of the evidence now before the Court, it appears likely that plaintiff will be able to show that the agency shop provision here infringes on her First Amendment rights, and it also appears unlikely that defendants will be able to show a sufficiently strong governmental interest to justify this infringement. The Court finds, therefore, that plaintiff has at least a reasonable likelihood of success on the merits.*

---

* Since the Court has already concluded that plaintiff has a reasonable likelihood of success on the merits of her first claim challenging the validity of the agreement on its face, the Court need not consider the likelihood that she will succeed on the merits of her second claim that she has been improperly required to pay fees over the amount germane to collective bargaining purposes.

II. Irreparable Harm.

While the Court agrees with defendants' contention that the injury occasioned by discharge from employment is usually not considered the type of harm that justifies injunctive relief, *Sampson v. Murray*, 415 U.S. 61, 91-92, 94 S.Ct. 937, 952-53 (1974); *Curtin v. Henderson*, 514 F.Supp. 16 (E.D.N.Y. 1980), there is clearly much more involved here than plaintiff's loss of employment.

The facts of this case may be profitably compared to those presented in *Burns v. Elrod*, 509 F.2d 1133 (7th Cir. 1975), *aff'd. sub nom, Elrod v. Burns*, 427 U.S. 347 (1976). In *Burns*, former employees of the office of the Sheriff of Cook County brought an action seeking reinstatement on the ground that defendant had unlawfully discharged them on the basis of their political associations and beliefs. Finding that loss of employment did not constitute irreparable harm, the district court denied injunctive relief. In reversing the district court, the Court of Appeals for the Seventh Circuit noted that the heart of the case was not plaintiffs' loss of employment, but rather the violation of their First Amendment rights of free association. *Id.* at 1136. The situation presented here is strikingly similar. Plaintiff's discharge was merely the event which precipitated this lawsuit. She had long protested that the agency shop agreement at issue here violated her rights. Because plaintiff does not contend that she was improperly discharged under the terms of the agreement, but rather that the agreement itself is invalid as violative of her First Amendment rights, it is clear that First Amendment violations are at the heart of the action.

Having found that the agency shop agreement at issue here infringes on plaintiff's First Amendment rights it is clear that this element of the test is satisfied, for it is well settled that infringement on First Amendment rights, even for minimal periods of time, constitute [sic] irreparable injury justifying the grant of a preliminary injunction.

Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689 (1976); *Citizens for a Better Environment v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975); *Spartans Youth League v. Board of Trustees*, 502 F.Supp. 789, 804 (N.D. Ill. 1980).

III. Balance of Harm.

It is clear that the threatened injury to the plaintiff outweighs any harm the injunction might inflict on defendants. In addition to the threat of violation of plaintiff's First Amendment rights, plaintiff will be unemployed if the injunction does not issue. In contrast, defendants have not shown that the requested injunction would impose any hardship or injury on them. In fact, the City of Fort Wayne would probably suffer greater injury if the imjunction were denied.

The evidence does not show, and defendants do not contend that plaintiff is an incompetent worker or that her services are not needed. On the contrary, defendants speak of the need for a replacement. Thus, the Court must conclude that plaintiff is a competent worker employed in a position that must be filled. If the injunction were not issued, the City would have to go through the expense and effort of hiring and training a new clerk while this action is pending. If plaintiff ultimately prevails on the merits, a result which this Court has already found likely, the City of Fort Wayne would be ordered to reinstate plaintiff, and all of the expense and energy spent on the replacement will have been wasted. If, however, the injunction were to issue and plaintiff ultimately lost on the merits, Fort Wayne would have had the benefit of a competent and experienced worker during the interim period, and could then seek a replacement without the threat that he or she might soon have to be discharged to allow for plaintiff's reinstatement.

The only harm that defendants have alleged is the harm the injunction might cause to the free and unfettered admin-

istration of the collective bargaining agreement. Since the Court has already found that this agreement is probably invalid, the Court cannot consider in this balance the effect of the injunction on its administration. Thus, the Court finds that the threatened injury to plaintiff outweighs the harm the injunction might inflict on the defendants.

IV. The Public Interest.

Defendants' only argument on this issue is also based on the enforcement of the agreement at issue here. Defendants argue that the public interest in furthering the goals of our national labor policy would be disserved by interfering in the administration of a collective bargaining agreement that furthers those goals. First, as the Court in *Abood* pointed out, the labor policies of state and local governmental units are not regulated by the National Labor Relations Act. *Abood*, 431 U.S. at 223, 97 S.Ct. at 1793, citing 29 U.S.C. § 152(2). Thus, the national labor policy does not apply here, and this agreement cannot be said to be in furtherance of that policy. Moreover, the Court has already found that this agreement is probably invalid on its face. The public interest cannot be disserved by failing to enforce such an agreement. Thus, the Court finds that the public interest will not be disserved by granting the injunction.

V. Conclusion.

Having found that plaintiff carried the burden of persuasion on all the essential prerequisites to the issuance of a preliminary injunction, the Court finds that plaintiff is entitled to the requested relief.

Accordingly, it is ORDERED that:

1. Defendant, City of Fort Wayne, is hereby ENJOINED from conditioning plaintiff's employment on the payment of union dues or an equivalent "agency fee" as set forth

in Article V of the Collective Bargaining Agreement between the defendants.

2. Defendant, City of Fort Wayne, shall REINSTATE plaintiff to her former employment with the same rights and privileges possessed by her prior to her termination.

3. This injunction is CONDITIONED upon plaintiff tendering to the Clerk of the Court during the pendency of this action an amount equivalent to the monthly fees or dues required under Article V of the Collective Bargaining Agreement between the defendants. Plaintiff is REQUIRED to tender these payments to the Court each month on or before the date that they would be required to be paid to defendant Local Lodge 2569 of the International Association of Machinists and Aerospace Workers, as determined by the rules and procedures of the union.

Entered this 14th day of May, 1982.

/s/ William C. Lee
WILLIAM C. LEE, Judge
United States District Court